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# The Thirteenth and Fourteenth Amendments: Constitutional Authority for Federal Legislation Against Private Sex Discrimination

Emily Calhoun\*

## I. INTRODUCTION

Reviewing federal legislative remedies against private discrimination, one is immediately struck by the disparity between remedies Congress has afforded victims of race discrimination and those afforded victims of sex discrimination. For example, Title VII of the Civil Rights Act of 1964<sup>1</sup> permits covered employers to exclude women as a class from any job if sex constitutes a "bona fide occupational qualification."<sup>2</sup> Title VII, which does not permit the exclusion of a member of a racial minority, as such, for any reason, represents a legislative decision not to give women the same protection with respect to employment that it extends to members of racial minorities. Another example of a lack of legislative fervor is apparent if one compares the provisions of 20 U.S.C. section 1681, proscribing sex discrimination in educational institutions that receive federal financial assistance,<sup>3</sup> with those of Title VI of the Civil Rights Act prohibiting race discrimination in the same context.<sup>4</sup> Although the language of

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1. 42 U.S.C. §§ 2000e - 2000e-15 (Supp. V 1975).

2. Title VII's broad statement that it is unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate . . . because of such individual's race, color, sex or national origin," *id.* § 2000e-2(a) (1), is undercut for women by a subsequent statutory provision that it is not unlawful to classify on the basis of sex if sex "is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . . ." *Id.* § 2000e-2(e). The bona fide occupational qualification has been very narrowly defined by the Equal Employment Opportunity Commission guidelines, 29 C.F.R. § 1604.1 *et seq.* (1976), so that in practice women may be almost as fully protected as racial groups. *But cf.* General Elec. Co. v. Gilbert, 97 S. Ct. 401 (1976) (pregnancy may, contrary to EEOC guidelines, be excluded from otherwise comprehensive employee disability programs).

3. 20 U.S.C. § 1681 (Supp. V 1975). *See also id.* §§ 1701-1721.

4. 42 U.S.C. § 2000d (Supp. V 1975).

section 1681(a) is almost identical to that of Title VI,<sup>5</sup> Congress qualified the basic prohibition of sex discrimination by exempting from coverage: 1) educational institutions whose primary purpose is training individuals for military service or for the merchant marine;<sup>6</sup> 2) any public institution of undergraduate higher education that traditionally and continually from its establishment has had a policy of admitting students of only one sex;<sup>7</sup> and 3) certain social organizations affiliated with educational institutions.<sup>8</sup> These exemptions are not included in Title VI.<sup>9</sup> Congress has, of course, in a few instances provided protection to victims of private sex discrimination which is equivalent to that extended to victims of race discrimination.<sup>10</sup> In general, however, one may accurately state that twentieth century federal legislation does not prohibit private discrimination based on sex as rigorously as it does that based on race.

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5. 42 U.S.C. § 2000d (Supp. V 1975) provides:

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving federal financial assistance.

The word "sex" is substituted for "race, color, or national origin," in 20 U.S.C. § 1681(a) (1970), but the coverage of the section is limited to "education" programs or activities receiving federal financial assistance.

6. 20 U.S.C. § 1681(a) (4) (Supp. V 1975).

7. *Id.* § 1681(a) (5).

8. *Id.* § 1681(a) (6).

9. See also the implementing regulations for 20 U.S.C. § 1681, 45 C.F.R. § 86 (1975). In 20 U.S.C. § 1681 Congress may even have given approval to sex discrimination by public entities, see text accompanying notes 6-8 *supra*, which is forbidden by the fifth and fourteenth amendments of the Constitution, an interesting possibility that will not be explored here.

Title VI and Title IX, 42 U.S.C. §§ 2000c-2000c-9 (Supp. V 1975), have also been interpreted differently by the courts. Although in *Lau v. Nichols*, 414 U.S. 563 (1974), the Supreme Court allowed plaintiffs claiming race discrimination to sue under Title VI, the Seventh Circuit refused to permit a plaintiff to bring a Title IX suit alleging that the admission standards of a private medical school receiving federal funds discriminated against women. *Cannon v. University of Chicago*, 45 U.S.L.W. 2149 (7th Cir. Aug. 27, 1976). The court distinguished *Lau* on the ground that it, unlike the case at bar, involved large numbers of plaintiffs trying to enforce a national constitutional right. *Id.* But see *Piascik v. Cleveland Museum of Art*, 45 U.S.L.W. 2310 (N.D. Ohio Dec. 2, 1976) (holding that Title IX creates a private cause of action).

10. For example, by a 1974 amendment, Congress made the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (Supp. V 1975), applicable to sex discrimination. Congress has also enacted an Equal Credit Opportunity Act forbidding both race and sex discrimination in credit transactions. 15 U.S.C. § 1691 (Supp. V 1975).

Although significant, the disparities in recent legislation are secondary to the disparity in legislative protection afforded to women and blacks by the recently resurrected nineteenth century civil rights statutes, codified in 42 U.S.C. sections 1981,<sup>11</sup> 1982,<sup>12</sup> and 1985 (3).<sup>13</sup> Unlike the more recent federal legislation which is based on Congress's article I, section 8 powers, these statutes are viewed as congressional implementations of the thirteenth and fourteenth amendments.<sup>14</sup> While it is established that these statutes prohibit private race discrimination, it has not been fully resolved whether their protection will be generally extended to women.

A review of the judicial resurrection of the nineteenth century statutes is in order. In 1968, in *Jones v. Alfred H. Mayer*

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11. 42 U.S.C. § 1981 (1970) provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens . . . .

12. 42 U.S.C. § 1982 (1970) provides:

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

13. The text of 42 U.S.C. § 1985 (3) (1970) reads, in relevant part:

If two or more persons in any State or Territory conspire or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws; or for the purpose of preventing or hindering the constituted authorities of any State or Territory from giving or securing to all persons within such State or Territory the equal protection of the laws . . . the party so injured or deprived may have an action for the recovery of damages . . . .

14. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-15 (Supp. V 1975), for example, is said to be based on congressional authority to regulate interstate commerce, U.S. CONST., art. I, § 8, cl. 3; although the 1972 amendments to Title VII, Act of March 24, 1972, P.L. No. 92-261, 86 Stat. 103 (codified in scattered sections of 42 U.S.C. §§ 2000e-2000e-15 (Supp. V 1975)), are based on the fourteenth amendment. *Fitzpatrick v. Bitzer*, 425 U.S. 902 (1976). Similarly, Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (Supp. V 1975), is said to be based on the power of Congress to levy and collect taxes, U.S. CONST. art. I, § 8, cl. 1. On the other hand, 42 U.S.C. §§ 1981 and 1982 are derived from the Civil Rights Act of 1866, which was promulgated after the ratification of the thirteenth amendment. 42 U.S.C. § 1985 (3) is derived from the Ku Klux Klan Act of 1871, which was passed after ratification of the fourteenth amendment. The Supreme Court has recently held that all three provisions are valid exercises of congressional authority to enforce the thirteenth amendment. See text accompanying notes 15-28 *infra*.

Co.,<sup>15</sup> the Supreme Court applied a long-neglected section of the Civil Rights Act of 1866 to prohibit race discrimination in the sale of property by private individuals, thereby giving racial minorities a new remedy against private discrimination. The plaintiff in *Jones* sued under 42 U.S.C. section 1982, which guarantees all citizens of the United States the same right to sell and purchase real property "as is enjoyed by white citizens."<sup>16</sup> The Supreme Court subsequently expansively defined the concept of property in *Sullivan v. Little Hunting Park, Inc.*,<sup>17</sup> and *Tillman v. Wheaton-Haven Recreation Association*,<sup>18</sup> and justified congressional promulgation of section 1982 by reference to section 2 of the thirteenth amendment, which states that Congress may enact appropriate legislation for securing the amendment's prohibition of slavery and involuntary servitude.<sup>19</sup>

In 1971 the scope of another nineteenth-century statute was similarly expanded in *Griffin v. Breckenridge*.<sup>20</sup> The Supreme Court there overruled a twenty-year-old decision<sup>21</sup> that narrowly construed the language of 42 U.S.C. section 1985(3) to reach only conspiracies under color of state law. Holding that section 2 of the thirteenth amendment gave Congress authority to prohibit private conspiracies to discriminate on the basis of race, the Court permitted black residents of Mississippi to pursue a damage claim against private individuals who allegedly had conspired to deprive the plaintiffs of equal rights and privileges.<sup>22</sup>

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15. 392 U.S. 409 (1968).

16. See note 12 *supra* for the text of section 1982.

17. 396 U.S. 229 (1969). In *Sullivan*, the board of directors of a private swimming pool corporation refused to approve the assignment of membership rights in the corporation from a white member who had leased his home to a black tenant. The Supreme Court characterized the interest conveyed to the tenant as a "leasehold of realty coupled with a membership share" in the corporation and held that this type of property interest was covered by section 1982. *Id.* at 236.

18. 410 U.S. 431 (1973). *Tillman*, like *Sullivan*, dealt with membership rights in a private, residential swimming pool corporation, but the rights could not be directly leased or transferred incident to the acquisition of property. Rather, the home buyer was given preferences—for example, priority on membership waiting lists—when he purchased a home in a certain geographical area. The Supreme Court held that these preferences were a "bundle of rights for which an individual pays" when buying a home, and that section 1982 operated to guarantee the rights equally to whites and nonwhites. *Id.* at 437.

19. 396 U.S. at 235; 410 U.S. at 439 n.11. See generally text accompanying notes 142-95 *infra*.

20. 403 U.S. 88 (1971).

21. *Collins v. Hardyman*, 341 U.S. 651 (1951).

22. 403 U.S. at 104-06.

Finally, in 1976, in *Runyon v. McCrary*,<sup>23</sup> the Supreme Court, following the same course it had charted for section 1982 in *Jones*, held that 42 U.S.C. section 1981, which gives all persons within the United States the same right to enforce and make contracts "as is enjoyed by white citizens," provides a remedy to black persons excluded from private schools solely because of their race. The *Runyon* opinion had been foreshadowed not only by *Jones* but also by the Court's decisions in *Tillman*<sup>24</sup> and *Johnson v. Railway Express Agency*.<sup>25</sup> The former decision implied that section 1981 was to be construed as broadly as section 1982 against private racial discrimination,<sup>26</sup> and the latter held that "[section] 1981 affords a federal remedy against discrimination in private employment on the basis of race."<sup>27</sup> *Runyon* identified the thirteenth amendment as the constitutional authority for section 1981.<sup>28</sup>

Judicial resurrection of sections 1981, 1982, and 1985(3) is significant for victims of private race discrimination because these statutes proscribe conduct and afford remedies that are not encompassed by more recent civil rights legislation.<sup>29</sup> For example, section 1981 prohibits private employment discrimination against blacks<sup>30</sup> and appears to apply to businesses employing fewer than 15 people even though Title VII does not.<sup>31</sup> While

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23. 96 S. Ct. 2586 (1976).

24. See note 18 *supra*.

25. 421 U.S. 454 (1975).

26. In *Tillman*, the Court simply held, without elaboration, that the private swimming pool corporation was governed by 42 U.S.C. § 1981. 410 U.S. at 439-40. See note 18 *supra*.

27. 421 U.S. at 459-60.

28. 96 S. Ct. at 2598.

29. Questions of the relationship between the older and newer civil rights legislation remain unresolved. See, e.g., *Tillman v. Wheaton-Haven Recreation Ass'n*, 410 U.S. 431 (1972). For a comparison of 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. §§ 3601-3631 (Supp. V 1975), see Smedley, *A Comparative Analysis of Title VIII and Section 1982*, 22 VAND. L. REV. 459 (1969). In *Runyon v. McCrary*, 96 S. Ct. 2586, 2595 n.10 (1976), the Supreme Court avoided deciding whether 42 U.S.C. § 2000a(e), exempting private clubs from the public accommodations section of the Civil Rights Act of 1964 and from the Fair Housing Act, required their exclusion from 42 U.S.C. §§ 1982 and 1981. See also *Washington v. Davis*, 96 S. Ct. 2040 (1976), in which the Court intimated that a section 1981 employment discrimination claim relating to a discriminatory job test was governed by standards "similar to those obtaining under Title VII." *Id.* at 2052.

30. *McDonald v. Santa Fe Trail Transp. Co.*, 96 S. Ct. 2574 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975).

31. "The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees. . . ." 42 U.S.C. § 2000e(b) (Supp. V 1975). See note 29 *supra*.

no recent civil rights legislation requires private segregated schools to admit blacks, section 1981 has been so construed in *Runyon*.<sup>32</sup> The Fair Housing Act, which prohibits discrimination in private real estate transactions, contains exemptions for single-family dwellings,<sup>33</sup> although section 1982 does not.<sup>34</sup> Moreover, injunctive relief and punitive damages, remedies that are often limited under the more recent federal legislation, are available under sections 1981 and 1982,<sup>35</sup> and statutes of limitations that generally govern sections 1981 and 1982 are significantly longer than the statutory filing deadlines of the twentieth century civil rights laws.<sup>36</sup> In addition, judicial redress for private discrimination in employment may be sought under sections 1981, 1982, and 1985(3) without first exhausting the often cumbersome administrative machinery of the more recent legislation.<sup>37</sup>

Although the nineteenth century legislation is a significant supplement to twentieth century remedies for private race discrimination, it has been judicially construed to give no compar-

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32. 96 S. Ct. 2586 (1976).

33. 42 U.S.C. § 3603(b) (1) (Supp. V 1975).

34. See Note, *Pioneering Approaches to Confront Sex Bias in Housing*, 24 CLEV. ST. L. REV. 79, 97 n.103 (1975).

35. Recent civil rights acts often do not permit the award of punitive damages. See *Tillman v. Wheaton-Haven Recreation Ass'n*, 367 F. Supp. 860, 864 (D. Md. 1973) (the fact that Title II may exclude punitive or other damages as a remedy does not mean that such damages are not recoverable under 42 U.S.C. § 1982), *rev'd on other grounds*, 517 F.2d 1141 (4th Cir. 1975). See also *Johnson v. Railway Express Agency*, 421 U.S. 454, 460 (1975) (a back pay award under section 1981 is not restricted to the two years specified for back pay recovery under Title VII; punitive damages are available under section 1981).

Although the more recent federal legislation used to be more advantageous to plaintiffs in that it allowed the court to award attorney's fees while the nineteenth century civil rights legislation did not, this advantage no longer exists. The Civil Rights Attorney's Fees Awards Act of 1976, Pub. L. No. 94-559, 90 Stat. 2641, *reprinted in* [1976] U.S. CODE CONG. & AD. NEWS No. 13 (to be codified at 42 U.S.C. § 1988), which became effective on October 19, 1976, gives courts the authority to award attorney's fees to the prevailing party in suits brought pursuant to 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986.

36. The applicable statute of limitations for section 1981 or section 1982 is drawn from state law and is usually one year. See *Runyon v. McCrary*, 96 S. Ct. 2586, 2598-99 (1976); *Johnson v. Railway Express Agency*, 421 U.S. 454, 462 (1975). Compare this to the 180-day filing deadline under Title VII, 42 U.S.C. § 2000e-5(e) (Supp. V 1975). See also *Sorenson v. Raymond*, 532 F.2d 496 (5th Cir. 1976) (tenant, evicted for entertaining black guest, sued landlord under 42 U.S.C. §§ 1982 and 3604; latter count dismissed for being brought too late, but suit under former allowed to proceed).

37. See *Johnson v. Railway Express Agency*, 421 U.S. 454, 460-61 (1975).

able protection to victims of private sex discrimination. With almost no exceptions, lower federal courts have refused to extend 42 U.S.C. section 1981 to reach private sex discrimination.<sup>38</sup> As a matter of statutory construction, these courts have read the language of section 1981 as an expression of congressional intent to prohibit only discrimination of a racial character. Presumably, the courts would comparably construe the similar language of section 1982.<sup>39</sup>

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38. See, e.g., *Knott v. Missouri Pac. R.R.*, 389 F. Supp. 856 (E.D. Mo.), *aff'd*, 527 F.2d 1249 (8th Cir. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974); *Troy v. Shell Oil Co.*, 378 F. Supp. 1042 (E.D. Mich. 1974), *appeal dismissed*, 519 F.2d 403 (6th Cir. 1975); *Olson v. Rembrandt Printing Co.*, 375 F. Supp. 413 (E.D. Mo. 1974), *aff'd*, 411 F.2d 1228 (8th Cir. 1975); *Held v. Missouri Pac. R.R.*, 373 F. Supp. 996 (S.D. Tex. 1974); *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636 (N.D. Cal. 1972); *Williams v. San Francisco Unified School Dist.*, 340 F. Supp. 438 (N.D. Cal. 1972); *Fitzgerald v. United Methodist Community Center*, 335 F. Supp. 965 (D. Neb. 1972). All these cases involved employment discrimination suits brought pursuant to 42 U.S.C. § 1981. *But see* *Parmer v. National Cash Register Co.*, 346 F. Supp. 1043 (S.D. Ohio 1972) (court gives no explanation for holding that women may sue for sex discrimination under section 1981). See also *Runyon v. McCrary*, 96 S. Ct. 2586, 2592 (1976) ("[These cases] do not present the question of the right of a private school to limit its student body to boys [or] girls . . . since 42 U.S.C. § 1981 is in no way addressed to such categories of selectivity.").

39. Both sections 1981 and 1982 guarantee all persons the same rights "as [are] enjoyed by white citizens." See notes 11-12 *supra*. Although no courts have considered the applicability of section 1982 to sex discrimination, courts have assumed that the language in section 1981 referring to rights enjoyed by white citizens emphasizes the racial character of the rights being protected. See, e.g., *League of Academic Women v. Regents of Univ. of Cal.*, 343 F. Supp. 636, 638-39 (N.D. Cal. 1972) (citing the Supreme Court's discussion of a portion of the Civil Rights Act of 1866 in *Georgia v. Rachel*, 384 U.S. 780 (1966)); cases cited in note 38 *supra*. Courts have, however, read this language broadly enough to extend the protection of these statutes to whites, *Williamson v. Hampton Mgmt. Co.*, 339 F. Supp. 1146 (N.D. Ill. 1972) (section 1982); *Walker v. Pointer*, 304 F. Supp. 56 (N.D. Tex. 1969) (section 1982), and to aliens, *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972), *aff'd*, 498 F.2d 641 (5th Cir. 1974) (section 1981). See note 170 *infra*. Were section 1982 construed to apply to sex discrimination, women might be able to successfully attack discriminatory insurance rates and coverage, since life insurance may be considered property under section 1982, *Sims v. Order of United Commercial Travelers of America*, 343 F. Supp. 112 (D. Mass. 1972). Similarly, since the courts have found that even the sale of an admission ticket is a contract for purposes of section 1981, *Scott v. Young*, 421 F.2d 142 (4th Cir.), *cert. denied*, 398 U.S. 929 (1970), and life insurance is certainly a contract, challenges to discriminatory insurance policies could also be brought under section 1981. Such challenges have been futile under other legal theories. See, e.g., *Broderick v. Associated Hosp. Serv. of Phila.*, 44 U.S.L.W. 2546 (3d Cir. May 6, 1976), in which a suit attacking discriminatory hospitalization



Judicial refusal to apply section 1985(3) to private sex discrimination is less consistent than the refusal to extend the protections of sections 1981 and 1982 to women.<sup>40</sup> Section 1985(3) contains no language that would invite an interpretation restricting its applicability to race discrimination.<sup>41</sup> It simply prohibits conspiracies to deprive any person of "the equal protection of the laws, or of equal privileges and immunities under the laws. . . ."<sup>42</sup> The Supreme Court has construed that language to prohibit any private conspiracy motivated by "some racial, or perhaps otherwise class-based, invidiously discriminatory animus."<sup>43</sup> Sex discrimination is clearly class-based,<sup>44</sup> and the Su-

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insurance policies brought under section 1983, one nineteenth century statute that affords a cause of action to women for fourteenth amendment violations, was dismissed for lack of the requisite state action.

40. For cases which have permitted sex discrimination suits against private individuals to proceed under section 1985(3), see *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975); *Pendrell v. Chatham College*, 386 F. Supp. 341 (W.D. Pa. 1974); *Stern v. Massachusetts Indem. & Life Ins. Co.*, 365 F. Supp. 433 (E.D. Pa. 1973).

For cases which have raised the question but left it undecided, see *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 75 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976) (dissenting opinion; majority dismissed complaint on ground that no conspiracy existed); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974) (since court found state action existed, no reason to reach the issue). The only court of appeals to directly decide the issue has refused to extend section 1985(3) to a private sex discrimination claim. *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (affirmed the dismissal of a female faculty member's suit alleging that the private university discriminated against women in promotion and salaries, holding that section 1985(3) did not extend to all tortious conspiratorial interferences with the rights of others). See also *DeCrow v. Hotel Syracuse Corp.*, 288 F. Supp. 530 (N.D.N.Y. 1968).

41. Section 1985(3) is free both of the "white citizen" language of sections 1981 and 1982 and the restrictive legislative history which limit the scope of those sections and invite more restrictive judicial interpretations. See *Buchanan, The Quest for Freedom: A Legal History of the Thirteenth Amendment* (pt. 6), 12 *HOUSTON L. REV.* 844 (1975).

42. See note 13 *supra* for the text of section 1985(3).

43. *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971). This statement by Justice Stewart for the majority may have implications for questions both of constitutional authority and statutory construction. See *Buchanan* (pt. 6), *supra* note 41, at 866. Although the opinion specifically left open the question of whether an invidiously discriminatory intent other than racial bias would be actionable under section 1985(3), 403 U.S. at 102 n.9, the dictum can be construed to mean not only that section 1985(3) may encompass all "class-based" discrimination, but also that Congress "perhaps" has constitutional authority to prohibit private class discrimination other than that based on race. To read Justice Stewart's equivocal "perhaps" as applying only to the issue of statutory construction would require acceptance of the proposition that Stewart thought the language of section 1985(3) might be limited to private race

preme Court's inclusion of state-supported sex discrimination within the activities proscribed by the race-neutral language of 42 U.S.C. section 1983<sup>45</sup> suggests that it would not disapprove similarly construing section 1985(3) to encompass sex discrimination.

A court's refusal to construe section 1985(3) to encompass private sex discrimination claims may rest on complex assumptions about the scope of congressional power under the fourteenth and thirteenth amendments rather than on the scope of the statutory language. The Seventh Circuit Court of Appeals, the only appellate court to decide the issue, stated that a section 1985(3) sex discrimination claim, bottomed on an alleged violation of the equal protection clause of the fourteenth amendment, required a showing of state action: Congress could not reach purely private conduct under that amendment.<sup>46</sup> The court also

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discrimination. That interpretation of the statute, however, would be at odds with the broad construction usually given civil rights statutes. *Griffin v. Breckenridge*, 403 U.S. at 97 (citing *United States v. Price*, 383 U.S. 787, 801 (1966)); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 437 (1968). Moreover, the language of section 1985(3), unlike that of sections 1981 and 1982, makes no reference to race. Section 1983, containing similarly broad language, has been construed to apply to both race and sex discrimination. See note 45 *infra*. If Justice Stewart's statement does imply that there is constitutional authority to prohibit private discrimination based on a factor other than race, however, he gives no indication of the source of that authority. Buchanan suggests that the dictum could be construed as conceding to Congress the power to protect nonracial classes under the thirteenth amendment. Buchanan, *supra* note 41, at 866.

44. See *Reichardt v. Payne*, 396 F. Supp. 1010, 1018 (N.D. Cal. 1975); *Pendrell v. Chatham College*, 386 F. Supp. 341, 347 (W.D. Pa. 1974); *Stern v. Massachusetts Indem. & Life Ins. Co.*, 365 F. Supp. 433, 442-43 (E.D. Pa. 1973) (courts held that sex discrimination is class-based within the meaning of section 1985(3)); cf. *Weise v. Syracuse Univ.*, 522 F.2d 397, 408-09 n.16 (2d Cir. 1975) (court did not resolve issue of "whether sex discrimination is the kind of 'class-based invidiously discriminatory animus' necessary for a § 1985 (3) conspiracy," but nevertheless permitted plaintiff to maintain suit under section 1985(3)). See also Buchanan (pt. 8), *supra* note 41, at 1072-84.

45. The Supreme Court has not specifically stated that individuals may use 42 U.S.C. § 1983 to challenge state-sponsored sex discrimination, but it has reached the merits of sex discrimination claims based on this statute. *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632 (1974); *Craig v. Boren*, 97 S. Ct. 451 (1976).

46. *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 829 (7th Cir. (1975), cert. denied, 425 U.S. 943 (1976)). The court had held in an earlier case, *Dombrowski v. Dowling*, 459 F.2d 19 (7th Cir. 1972), that the fourteenth amendment provided a right to protection only against unequal treatment by a state, and it reiterated this holding in *Cohen*, 524 F.2d at 828. See note 98 *infra*. The court again adopted this position in

assumed that the cause of action could not be based on the thirteenth amendment, which admittedly reaches private conduct, because the plaintiff was not discriminated against on a racial basis.<sup>47</sup> The combined effect of these two assumptions is to concede to Congress less power to protect women from sex discrimination than it has to protect racial groups from race discrimination.<sup>48</sup> Other courts that have faced the issue in section 1985(3) cases have generally failed to fully discuss these constitutional questions.<sup>49</sup>

The validity of any judicial assumption that Congress is constitutionally restricted in legislating against private sex discrimination is of great significance to women. In the first place, if the assumption is erroneous, it is possible to argue persuasively that federal courts should give women, as well as blacks, the ex-

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Murphy v. Mt. Carmel High School, 45 U.S.L.W. 2232 (7th Cir. Oct. 4, 1976).

47. The court stated:

We have no doubt that discrimination which is invidious because of racial motivation would be covered since the protection of the Thirteenth Amendment is not merely against state action. But since the Court in *Griffin* so carefully refrained from holding that any discrimination which would be actionable if practiced by the State is for that reason also actionable under § 1985(3), we remain convinced that our reasoning in *Dombrowski* is a correct explanation of why the statute does not broadly "apply to all tortious, conspiratorial interferences with the rights of others."

524 F.2d at 829 (citation omitted).

48. It should be noted that in his denial of the plaintiff's petition for rehearing in *Cohen*, Judge Stevens wrote that "our opinion assumed for the purpose of decision the Congress has ample power to enact a statute having the coverage urged by petitioner but concluded that § 1985(3) is not such a statute." 524 F.2d at 830. This cursory statement does not affect the fundamental assumptions underlying the holding of the case; Stevens was simply assuming the answer to a very broad constitutional question in order to reach the particular issue before the court.

49. In *Pendrell v. Chatham College*, 386 F. Supp. 341, 348 (W.D. Pa. 1974), the court discussed limitations on congressional authority under the thirteenth and fourteenth amendments, but permitted the plaintiff to maintain her action under section 1985(3) for the indecipherable reason that "the Thirteenth Amendment's restrictiveness is overborne by the all-inclusive effect of the Equal Protection clause of the Fourteenth Amendment."

In *Reichardt v. Payne*, 396 F. Supp. 1010, 1017 (N.D. Cal. 1975), the court disputed the fact that Congress cannot reach purely private conduct under the fourteenth amendment, and therefore permitted the plaintiff to bring her suit.

The court in *Stearns v. Massachusetts Indem. & Life Ins. Co.*, 365 F. Supp. 433, 442-43 (E.D. Pa. 1973), permitted the 1985(3) claim, but touched upon the constitutional issues only in discussing whether sex discrimination is "class-based" within the meaning of *Griffin v. Breckenridge*.

tensive protection of nineteenth century federal civil rights legislation. At the very least, section 1985(3) should apply to women, for unlike sections 1981 and 1982, its language is race-neutral.<sup>50</sup> In addition, if Congress is acknowledged to have extensive legislative authority under the thirteenth and fourteenth amendments, any judicial doubts concerning the constitutionality of applying recent federal legislation, such as the Fair Housing Act, to private sex discrimination should be eliminated.<sup>51</sup> Depriving Congress and the federal courts of any constitutional justification for perpetuating disparities in the legislative protection given women and blacks is crucial, since any real or imagined constitutional limitations on federal legislation against private sex discrimination give an historically insensitive judiciary and legislature a ready excuse for restraint.<sup>52</sup>

This Article will demonstrate that recent Supreme Court decisions on Congress's power to prohibit private discrimination under the enforcement provisions of the thirteenth and fourteenth amendments justify the conclusion that Congress has

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50. See notes 13 & 41 *supra*.

51. The Fair Housing Act, 42 U.S.C. §§ 3601-3631 (Supp. V 1975), is consistently read as thirteenth amendment legislation, but the cases in which the issue has been raised have involved race discrimination. See, e.g., *Williams v. Matthews Co.*, 499 F.2d 819 (8th Cir. 1974); *United States v. Bob Lawrence Realty Co.*, 474 F.2d 115 (5th Cir.), *cert. denied*, 414 U.S. 826 (1973); *United States v. Hunter*, 459 F.2d 205 (4th Cir.), *cert. denied*, 409 U.S. 934 (1973); *United States v. L. & H. Land Corp.*, 407 F. Supp. 576 (S.D. Fla. 1976); *United States v. Hughes Memorial Home*, 396 F. Supp. 544 (W.D. Va. 1975); *United States v. Real Estate Develop. Corp.*, 347 F. Supp. 776 (N.D. Miss. 1972). It has been suggested that the lack of a firm base of thirteenth amendment authority was the reason Congress left obscure the constitutional basis of the Fair Housing Act's proscription on sex discrimination. See Buchanan (pt. 5), *supra* note 41, at 627.

52. Of course one can always speculate that the reason for the failure to provide women the same protection against private discrimination as is given to racial minorities is that congressional and judicial attitudes toward sex discrimination reflect societal attitudes toward women and are characterized by the same lack of male empathy. See Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U.L. Rev. 675 (1971). Pursuit of this argument is not particularly productive, since the proposition is self-evident to some but outrageous to others, and its proof or disproof is impossible. What is important is the extent to which any member of Congress or a judge can rely on a constitutional argument to justify legislative disparities in the protection given to women, for the availability of such an argument may prevent honest confrontation of whatever sexist attitudes may exist. For this reason, this Article focuses on the validity of the legal assumption that Congress is constitutionally restricted in taking action against private sex discrimination rather than on sexist attitudes themselves.

greater authority to legislate against private sex discrimination than has so far been fully recognized. The focus is on the thirteenth and fourteenth amendments for a number of reasons. First, these amendments are the constitutional provisions most directly applicable, by language and intent, to discriminatory conduct. The only prerequisite to congressional action to enforce the thirteenth amendment is the determination that a badge or incident of slavery, as rationally defined by Congress, exists.<sup>53</sup> Enforcement of the fourteenth amendment is partially restricted by the state action language of section 1,<sup>54</sup> but it, like the thirteenth, is specifically directed at discrimination. Second, because of the similarity in wording of the fourteenth amendment and the proposed equal rights amendment, conclusions about the scope of the enforcement clause of the former bear directly on congressional power to proscribe private sex discrimination under the latter, should it be ratified.<sup>55</sup> Finally, there is no other

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53. *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (thirteenth amendment); *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 440-41 (1968) (thirteenth amendment). For a discussion of the potentially broad reach of this power, see text accompanying notes 142-95 *infra*.

54. See text accompanying notes 72-73 *infra*.

55. The language of the proposed equal rights amendment parallels that of the fourteenth amendment and will, therefore, add little to congressional authority to prohibit private sex discrimination beyond that which already exists under the fourteenth amendment. The amendment states that "equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex" and gives Congress "the power to enforce by appropriate legislation," its substantive provisions. Until the 1971 legislative session, the proposed enforcement clause stated only that "Congress and the several States shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation," thereby limiting Congress's power to that secured by some other portion of the Constitution. See S. REP. NO. 267, 78th Cong., 1st Sess. at 1 (1943).

Although legislative debate on the current form of the amendment virtually ignored the enforcement clause, that the language was altered to conform to section 5 of the fourteenth amendment means they will be comparably construed. Congressional authority to legislate against private sex discrimination under the equal rights amendment, however, could not be undercut by the judicial development of a double standard, as it has under the fourteenth amendment. See text accompanying notes 117-40 *infra*. Ratification of the equal rights amendment would, therefore, foreclose any argument that Congress has less extensive powers to proscribe private sex discrimination than to prohibit private race discrimination under the fourteenth amendment. For a discussion of changes in congressional authority that might be occasioned by ratification of the equal rights amendment, see text following note 140 *infra*.

Much has been written on the equal rights amendment. For interesting discussions of the need for the amendment and its impact on existing laws, see Brown, Emerson, Falk & Freedman, *The Equal Rights*

source of congressional authority as extensive as that contained in the thirteenth and fourteenth amendments. To be sure, Congress may act pursuant to its authority to promulgate legislation "necessary and proper" to further its general powers enumerated in article I of the Constitution,<sup>56</sup> but that source of authority is limited.<sup>57</sup>

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*Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 871 (1971) [hereinafter cited as *The Equal Rights Amendment*]; Elsen, Coogan & Ginsburg, *Men, Women and the Constitution: The Equal Rights Amendment*, 10 COLUM. J. L. SOC. PROB. 77 (1973).

56. See note 14 *supra*.

57. It can be argued that Congress has sufficient power under the commerce clause to make superfluous thirteenth and fourteenth amendment sources of congressional authority to prohibit private sex discrimination. For example, Title II of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000a - 2000a-6 (Supp. V 1975), which prohibits private racial discrimination in public accommodations, was adopted partially pursuant to the commerce clause power. See *Hearings Before the Senate Committee on Commerce on S.1732*, 88th Cong., 1st Sess., parts 1 & 2 (1963). In *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241 (1964), and *Katzbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court upheld Title II as a valid exercise of congressional power to regulate interstate commerce. The Court held that Title II extended to restaurants which simply sold food that had moved in interstate commerce, indicating a clear willingness to uphold federal legislation primarily geared to the accomplishment of a noneconomic objective, such as the elimination of private racial discrimination, so long as it has some tenuous connection with commerce. In fact, in *McClung*, the Court sanctioned legislation affecting a private activity which alone has no significant effect on commerce but which, as a nationwide practice, could have such an impact. 379 U.S. at 300-01. Recent Supreme Court decisions reiterate that the Court will defer to congressional findings that private activity has an impact on interstate commerce. See, e.g., *Barrett v. United States*, 96 S. Ct. 498 (1976); *Perez v. United States*, 402 U.S. 146 (1971).

The Supreme Court's deference to the congressional exercise of commerce clause authority gives Congress much leeway to prohibit private sex discrimination. That leeway is not unlimited, however. No Supreme Court decision has completely dispensed with the requirement that there be some connection between interstate commerce and the private activity that is the subject of commerce clause legislation. It would be extremely difficult, for example, to justify 42 U.S.C. § 1981 as a valid exercise of commerce clause authority, since the statute simply prohibits private racial discrimination in the making of all types of contracts. Not all types of contracts can be construed as related to interstate commerce. The thirteenth amendment, on the other hand, clearly authorizes legislation of this breadth, although congressional authority may be limited by the need to demonstrate that a failure to contract imposes a badge or incident of slavery, see text accompanying notes 157-67 *infra*. If Congress were to enact a statute comparable to section 1981 for the benefit of women it would probably have to seek some source of constitutional authority other than its commerce clause powers. For a general discussion of congressional authority under the commerce clause, see P. BENSON, JR., *THE SUPREME COURT AND THE COMMERCE CLAUSE, 1937-1970* (1970).

The interpretation of the fourteenth and thirteenth amendments is therefore centrally important to ascertaining both the broadest scope of, and possible constitutional limitations on, congressional action against private sex discrimination. Any assumption that Congress has more limited authority to legislate against private sex discrimination than against discrimination based on race is not justified, especially in light of the implications of a recent Supreme Court decision, *McDonald v. Santa Fe Trail Transportation Co.*<sup>58</sup> If, as will be suggested, there is some authority under the fourteenth amendment, and extensive authority under the thirteenth, for protecting women against private sex discrimination, federal courts will no longer be able to deny women the full protection of existing federal legislation.<sup>59</sup> If there is no such authority, women will need not only ratification of the equal rights amendment but also a constitutional equivalent to the thirteenth amendment to ensure their equal treatment.<sup>60</sup>

## II. THE SCOPE OF CONGRESSIONAL LEGISLATIVE AUTHORITY UNDER THE FOURTEENTH AND THIRTEENTH AMENDMENTS

### A. THE FOURTEENTH AMENDMENT

#### 1. *The relationship between sections 5 and 1 of the fourteenth amendment.*

The fourteenth amendment of the Constitution provides in section 1 that no state shall "deny to any person within its jurisdiction the equal protection of the laws." Section 5 of the amendment gives Congress "power to enforce, by appropriate legislation," the provisions of section 1. In *Griffin v. Breckenridge*,<sup>61</sup> the Supreme Court held that 42 U.S.C. section 1985(3) applied to private racial discrimination and was a valid exercise of thirteenth amendment power, but explicitly refused to consider whether the power to proscribe private discriminatory conduct might also derive from section 5 of the fourteenth amend-

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58. 96 S. Ct. 2574 (1976). See text accompanying notes 174-83 *infra*.

59. To the extent that the courts feel bound by the legislative history of certain congressional enactments, they may, of course, continue to restrict the application of those statutes in a manner consistent with that history. See note 39 *supra* & note 193 *infra* and accompanying text.

60. See note 55 *supra*.

61. 403 U.S. 88, 107 (1971). See text accompanying note 22 *supra*.

ment. The question has not been answered by the Court since that time.

The legislative history of the fourteenth amendment, which theoretically should be helpful in determining the extent of congressional authority, is confusing. Some statements in the congressional debates indicate that the fourteenth amendment was not intended to permit Congress to reach private conduct; others suggest the contrary.<sup>62</sup> That a large portion of the debates consisted of descriptions of racial discrimination by private persons provides some support for the second position.<sup>63</sup> One might also argue that the division of the amendment into sections 1 and 5 was not meant to dilute the broad grant of legislative authority apparent in the original draft, but was only an alternative expression of the original statement that Congress should have power to make all laws necessary and proper to ensure equality of rights and privileges.<sup>64</sup> Whether the debates support the notion that Congress may prohibit discriminatory private conduct is, at best, ambiguous.

Although the congressional debates thus provide little guidance, the Supreme Court, at least since the *Civil Rights Cases*,<sup>65</sup> has adhered to the principle that the language of section 1 of

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62. For the reports of the legislative history of the fourteenth amendment, see H. FLACK, *THE ADOPTION OF THE FOURTEENTH AMENDMENT* (1908); J. TEN BROEK, *EQUAL UNDER LAW* (1965) (originally published as *THE ANTI-SLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT* (1951)); Avins, *The Ku Klux Klan Act of 1871: Some Reflected Light on State Action and the Fourteenth Amendment*, 11 ST. LOUIS U.L.J. 331 (1967); Fairman, *Does the Fourteenth Amendment Incorporate the Bill of Rights? The Original Understanding*, 2 STAN. L. REV. 5 (1949); Frank & Munro, *The Original Understanding of "Equal Protection of the Laws"*, 50 COLUM. L. REV. 131 (1950).

63. See the reports of the debates in 1 B. SCHWARTZ, *STATUTORY HISTORY OF THE UNITED STATES: CIVIL RIGHTS* 591-92 (1970); Frantz, *Congressional Power to Enforce the Fourteenth Amendment Against Private Acts*, 73 YALE L.J. 1353, 1354-55 (1964).

64. See TEN BROEK, *supra* note 62, at 203-23.

65. In the *Civil Rights Cases*, 109 U.S. 3 (1883), the Court invalidated legislation prohibiting private discrimination in public accommodations. The Court declared:

The first section of the Fourteenth Amendment (which is the one relied on) . . . is prohibitory in its character, and prohibitory upon the States . . . Individual invasion of individual rights is not the subject-matter of the amendment. It has a deeper and broader scope. It nullifies and makes void all State legislation, and State action of every kind, . . . which denies to any [citizen] the equal protection of the laws.

*Id.* at 10-11. See also *United States v. Harris*, 106 U.S. 629, 638 (1883); *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875); *The Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36 (1872).



the fourteenth amendment forbids only state, as opposed to private, denials of equal protection. It is commonly accepted that a state's failure to act affirmatively to prevent private discrimination is not alone a state denial of equal protection.<sup>66</sup> In other words, according to the conventional judicial view, there is no violation of section 1 if one private individual discriminates against another on the basis of race or sex and the state simply fails to take measures to stop the discrimination.

Early Supreme Court decisions took the position that the language of section 1 determined the scope of congressional authority under section 5. In the *Civil Rights Cases*,<sup>67</sup> *United States v. Harris*,<sup>68</sup> and *United States v. Cruikshank*,<sup>69</sup> all of which considered the validity of federal legislation under the fourteenth amendment, the construction of section 1 was a central issue. For example, in the *Civil Rights Cases*, Justice Bradley stated that the last section of the fourteenth amendment invested Congress with power to enforce only the prohibition contained in section 1 and that section 1 operated only against "State laws or State proceedings."<sup>70</sup> The Court emphasized the principles of federalism underlying the state action limitation; the fourteenth amendment was not intended to permit Congress to regulate private rights which were traditionally within the sovereign domain of state legislatures.<sup>71</sup>

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66. Over the years, various advocates have urged recognition of the fact that there are two ways in which a state may deny equal protection of the laws, see, e.g., CONG. GLOBE, 39th Cong., 1st Sess., 1833 (1866) (a state may deny equal protection "either by prohibitory laws, or by a failure to protect" the citizen); Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection and California's Proposition 13*, 81 HARV. L. REV. 69, 73, 102, n.119 (1967) (a state that fails to secure rights denies them); *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 230 (1970) (Brennan, J., dissenting) (state inaction alone may convert customary private discrimination into a denial of equal protection which Congress had power to remedy under sections 1 and 5 of the fourteenth amendment). Despite these arguments, the Supreme Court has never held that the mere failure to prevent private discrimination is a state denial of equal protection. The Court has also failed to accept a similar argument that, because the state always attributes some legal significance to private action, private action can be reached through the fourteenth amendment. See Horowitz, *The Misleading Search for "State Action" Under the Fourteenth Amendment*, 30 S. CAL. L. REV. 208 (1957).

67. 109 U.S. 3 (1883).

68. 106 U.S. 629 (1883).

69. 92 U.S. 542 (1875).

70. 109 U.S. at 11. The same position was taken by the Court in *United States v. Harris*, 106 U.S. 629, 638 (1883), and in *United States v. Cruikshank*, 92 U.S. 542, 554-55 (1875).

71. As the Supreme Court stated in the *Civil Rights Cases*, the four-

Over the years, the Supreme Court has expanded its definition of state action to encompass more than "State laws or State proceedings," but it has never abandoned the basic interpretation of the fourteenth amendment that relates congressional authority under section 5 to the state action language in section 1.<sup>72</sup> If that interpretation is still valid, the question left unresolved in *Griffin* must be answered in the negative: Congress derives no authority from the fourteenth amendment to interfere with purely private discriminatory conduct and may prohibit private discrimination only when it is connected with some affirmative act of the state.<sup>73</sup>

Some commentators have argued, however, that Congress's authority to control private conduct under section 5 is broader than the judiciary's power under section 1. According to this theory, federal courts may intervene in private discrimination only if the state is affirmatively involved, but Congress can reach such conduct without regard to state action or when Congress itself has determined that the state is denying its citizens the equal protection of the laws.<sup>74</sup> Although the argument is appealing to those who view with dismay the Supreme Court's nar-

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teenth amendment did not give Congress authority to "legislate upon subjects which are within the domain of State legislation . . ." 109 U.S. at 10-11. Although the Court recognized that state action may be restricted by Congress, it held that the amendment did not empower Congress to enact the equivalent of a "code of municipal law for the regulation of private rights." *Id.* Only if Congress legislated "against State action, however put forth" would its action under section 5 not amount to an "invasion of State sovereignty." *Ex parte Virginia*, 100 U.S. 339, 346 (1879). See also *United States v. Harris*, 106 U.S. 629, 635-36 (1883); *United States v. Cruikshank*, 92 U.S. 542, 549-51 (1875).

72. Even some of the statements in *United States v. Guest*, 383 U.S. 745 (1966), which have been interpreted as acknowledging broad congressional authority under section 5 of the fourteenth amendment, when carefully read, link the scope of congressional authority to the state action language in section 1. See text accompanying notes 90-96 *infra*.

73. For more extensive discussions of congressional power to enforce the fourteenth amendment, see, e.g., Cohen, *Congressional Power to Interpret Due Process and Equal Protection*, 27 STAN. L. REV. 603 (1975); Cox, *The Role of Congress in Constitutional Determinations*, 40 U. CIN. L. REV. 199, 226-39 (1971); Kalven, *The Supreme Court, 1970 Term*, 85 HARV. L. REV. 3, 152-67; Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449, 461-66 (1974).

74. See, e.g., Yackle, *The Burger Court, "State Action," and Congressional Enforcement of the Civil War Amendments*, 27 ALA. L. REV. 479 (1975). Frantz argues that the *Civil Rights Cases*, *United States v. Harris*, and *United States v. Cruikshank* have been misread and stand only for the proposition that Congress may not legislate pursuant to section 5 unless the state fails to fulfill its responsibility to ensure equal protection of the laws to all of its citizens. Frantz, *supra* note 63.

rowed definition of "state action", it is difficult to support; it necessarily rests on the assumption that the Court is prepared to discard the holdings and the principles of federalism expressed in the early cases.<sup>75</sup> The *Jones* case by analogy supports this position, for the Supreme Court broadly construed congressional power under the enforcement clause of the thirteenth amendment, reversing earlier decisions that had strictly limited that power.<sup>76</sup> The concurring opinions of six Justices in *United States v. Guest*,<sup>77</sup> suggesting that Congress has broad authority to proceed against private persons under section 5 of the fourteenth amendment, also may imply that the Court may move beyond the strictures of the reasoning and the holdings of early cases. Indeed, the most recent decision<sup>78</sup> to acknowledge Congress's broad authority under section 5 specifically relates that authority to restrictions placed on overt state action.<sup>79</sup> The fact remains, however, that the Supreme Court has never specifically discarded the state action limitation.

Two certain things can be said of the Supreme Court's recent decisions in this area. First, congressional authority to

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75. See note 71 *supra*.

76. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968). See text accompanying notes 157-61 *infra*. See also *South Carolina v. Katzenbach*, 383 U.S. 301 (1966), broadly construing congressional authority under the fifteenth amendment.

77. 383 U.S. 745 (1966). See text accompanying notes 92-98 *infra*.

78. *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976) (Congress's fourteenth amendment enforcement power overrides state sovereignty and Congress may provide for private suits against states).

79. *Id.* at 2671. It is interesting to contrast the treatment of federal-state relations in *Fitzpatrick v. Bitzer*, 96 S. Ct. 2666 (1976) with *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976). In *Usery* the Supreme Court held that the commerce clause does not empower Congress to include state and local government employees within the Fair Labor Standards Act. The first two courts to apply *National League of Cities* refused to exempt public employers from the coverage of federal acts prohibiting discrimination. In *Usery v. Salt Lake City Bd. of Educ.*, 45 U.S.L.W. 2155 (D. Utah Aug. 31, 1976), the court held that state employers had to comply with the Age Discrimination in Employment Act, notwithstanding *National League of Cities*, because the age discrimination provisions of the Act were enacted pursuant to section 5 of the fourteenth amendment. In *Usery v. Bettendorf Community School Dist.*, 423 F. Supp. 637 (S.D. Iowa 1976), the court held the equal pay provisions of the Fair Labor Standards Act applicable to school district employees because it was only a minimal federal intrusion. "Discrimination in pay on the basis of sex is not an attribute of Sovereignty within the contemplation of the Tenth Amendment which was the concern in *National League of Cities*. . . ." *Id.* at 638.

legislate under section 5 may be independent of a *judicial* finding that the state's actions have denied equal protection of the laws. Justice Brennan took this position in *Katzenbach v. Morgan*<sup>80</sup> in upholding a portion of the 1965 Voting Rights Act.

A construction of § 5 that would require a judicial determination that the enforcement of the state law precluded by Congress violated the Amendment, as a condition of sustaining the congressional enactment would depreciate both congressional resourcefulness and congressional responsibility for implementing the Amendment. It would confine the legislative power in this context to the insignificant role of abrogating only those state laws that the judicial branch was prepared to adjudge unconstitutional, or of merely informing the judgment of the judiciary by particularizing the "majestic generalities" of § 1 of the Amendment.<sup>81</sup>

This position is supported by the oft-repeated generalization that the fourteenth amendment made Congress, not the judiciary, the chief guardian of protected rights.<sup>82</sup> It is also consistent with the Supreme Court's suggestion that Congress has more leeway to enforce the thirteenth amendment through legislation than do the courts by way of judicial decree.<sup>83</sup>

The *Morgan* opinion, however, does not give Congress license to disregard the state action limitation of section 1. The Court did not reach the question of Congress's power either to ignore the state action limitation or to decide for itself whether sufficient state action exists; the state in *Morgan* had clearly acted by imposing a literacy test as a qualification for voting. Furthermore, in a subsequent decision, *Oregon v. Mitchell*,<sup>84</sup> a majority of the Justices agreed that *Morgan* did not sanction congressional definition of the substantive limitations of the fourteenth amendment, but only congressional authority to make factual determinations regarding equality of treatment in areas that clearly fell

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80. 384 U.S. 641 (1966). See Burt, *Miranda and Title II: A Morganatic Marriage*, 1969 SUP. CT. REV. 81 (*Morgan* stands for the proposition that where Court and Congress disagree about the meaning of the fourteenth amendment, the Court will sometimes defer to Congress's interpretation); Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 99-108 (1966).

81. 384 U.S. at 648-49.

82. See, e.g., *Harper v. Virginia State Bd. of Elections*, 383 U.S. 663, 678-80 (1966) (Black, J., dissenting); *Ex parte Virginia*, 100 U.S. 339, 345 (1879). See also *United States v. Guest*, 383 U.S. 745, 781-84 (1966) (Brennan, J., concurring in part, dissenting in part).

83. See *Palmer v. Thompson*, 403 U.S. 217, 226-27 (1971), quoted in text accompanying note 189 *infra*.

84. 400 U.S. 112 (1970).

within the scope of the amendment.<sup>85</sup> Thus, although the Court has indicated that the judiciary may defer to congressional fact-finding as to whether discrimination exists, it has never suggested that courts must accept a congressional decision to ignore or legislatively define the substantive state action requirement.<sup>86</sup>

The second statement that can be made with some certainty about congressional power under section 5 is that Congress can

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85. In *Morgan*, the Court had said:

It was for Congress, as the branch that made this judgment [regarding literacy tests imposed by the state], to assess and weigh the various conflicting considerations—the risk or pervasiveness of the discrimination in governmental services, the effectiveness of eliminating the state restriction on the right to vote as a means of dealing with the evil, the adequacy or availability of alternative remedies, and the nature and significance of the state interests that would be affected by the nullification of the English literacy requirement . . . . It is not for us to review the congressional resolution of these factors.

384 U.S. at 653. In *Oregon v. Mitchell*, 400 U.S. 112 (1970), Justices Brennan, White, and Marshall would have upheld the authority of Congress to prescribe an 18-year age limit on voter qualifications for state elections. They took the position that the Supreme Court had clearly made the exercise of state power to set voter qualifications subject to the equal protection clause. On the basis of their assumption that the Court had already decided this substantive issue, 400 U.S. at 241-42, the Justices cited *Morgan* for the proposition that Congress is the appropriate entity to resolve "complex factual questions" regarding discrimination in the setting of voter qualifications. *Id.* at 247-49. Justices Stewart, Burger, and Blackmun appeared to adhere to the decision in *Morgan* but distinguished the *Morgan* facts from those in *Mitchell*:

But it is necessary to go much further [than the Court did in *Morgan*] to sustain § 302. The state laws that it invalidates do not invidiously discriminate against any discrete and insular minority. Unlike the statute considered in *Morgan*, § 302 is valid only if Congress has the power not only to provide the means of eradicating situations that amount to a violation of the Equal Protection Clause, but also to determine as a matter of substantive constitutional law what situations fall within the ambit of the clause, and what state interests are "compelling."

*Id.* at 296. Justice Harlan's opinion clearly stated his position that Congress should not have the final say on matters of substantive constitutional interpretation. *Id.* at 204-09. Justices Black and Douglas did not directly address the question.

86. The Court might defer to a legislative judgment on the state action issue where the issue was not clearcut, because questions regarding the nature and degree of state involvement in private conduct may be as complex as the factual questions regarding the impact of overt state action were in *Morgan*. See note 85 *supra*. The Court would not, however, permit Congress to exceed the constitutional standard; it would still have to decide whether the congressional determination comported with its definition of state action. The following comparison of judicial and congressional enforcement of the fourteenth amendment also supports this interpretation:

The judiciary can and should deal with [private] discrimination

reach some private conduct. In language paralleling that used in interpreting the necessary and proper clause,<sup>87</sup> the Supreme Court has stated that section 5 means:

Whatever legislation is appropriate, that is, adapted to carry out the object the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality of civil rights and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.<sup>88</sup>

This interpretation gives some leeway to Congress to protect individuals from private discrimination but does not completely eliminate the state action restrictions imposed by section 1. For example, private individuals often act jointly with the state, and, when so acting, their conduct can be regulated.<sup>89</sup> To say that Congress may reach some private conduct through the enforcement clause of the fourteenth amendment, however, is not to say that Congress may regulate *all* private conduct. In *United States v. Guest*,<sup>90</sup> several Justices of the Supreme Court may have appeared to take this position, but a close reading demonstrates the contrary.

In *Guest* the Court sustained an indictment brought under 18 U.S.C. section 241 against private individuals who had harassed blacks attempting to use public facilities. Justice Stewart, writing for the majority,<sup>91</sup> did not confront the issue of congressional authority to prohibit private discrimination under section

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accompanied by State neglect of the protection obligation, and . . . where highly significant affirmative involvements of the state in the discriminatory course of conduct are visible. A point will be reached where the weight of the problem shifts to the question whether a prudent use is being made of the resources of law to afford "protection." With issues in this area, Congress is especially well equipped to deal. If Congress, judging on the larger situation, concludes that state "protection" of an interest going to the life of "equality" is inadequate, is unreasonably short of prudently assessed possibility, "appropriate legislation," under section 5, might be the furnishing of a supplementary or substitute set of remedies. There is no warrant for erecting a set of artificial limitations on this legislative power.

Black, *supra* note 66, at 106.

87. U.S. CONST. art. I, § 8, cl. 18. See *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819).

88. *Ex parte Virginia*, 100 U.S. 339, 345-46 (1879).

89. See, e.g., *Adickes v. S.H. Kress*, 398 U.S. 144 (1970).

90. 383 U.S. 745 (1966).

91. In addition to the majority opinion and the concurrences discussed in the text, Justice Harlan wrote a concurrence and dissent. *Id.* at 762.

5 of the fourteenth amendment. Six Justices, however, went beyond the narrow basis of Stewart's opinion. Justices Clark, Black, and Fortas stated that "there now can be no doubt that the specific language of § 5 empowers the Congress to enact laws punishing all conspiracies—with or without state action—that interfere with Fourteenth Amendment rights."<sup>92</sup> Justices Brennan, Warren, and Douglas were even more explicit:

Although the Fourteenth Amendment itself, according to established doctrine, "speaks to the State or to those acting under the color of its authority," legislation protecting rights created by that Amendment, such as the right to equal utilization of state facilities, need not be confined to punishing conspiracies in which state officers participate. Rather, § 5 authorizes Congress to make laws that it concludes are reasonably necessary to protect a right created by and arising under that Amendment . . . .<sup>93</sup>

The language used by these six Justices has sometimes been interpreted to recognize congressional power to punish all private conspiracies to discriminate.<sup>94</sup> Such an interpretation, however, takes the language out of context, for all members of the Court recognized that the *state* was involved in the provision of the facilities to which the *Guest* plaintiffs were denied access.<sup>95</sup> The most precise and reasonable reading of these opinions is that Congress has the power to punish private individuals if it is necessary to protect the right to equal utilization of state facilities. Just as Congress can prevent state officials from denying equal access

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92. *Id.*

93. *Id.* at 782.

94. Some lower federal courts have read these opinions as holding that section 5 gives Congress authority to prohibit all private discrimination. See, e.g., *Westberry v. Gilman Paper Co.*, 507 F.2d 206, 211 (5th Cir. 1971) (opinion withdrawn as moot); *Action v. Gannon*, 450 F.2d 1227 (8th Cir. 1971) (*en banc*); *Reichardt v. Payne*, 396 F. Supp. 1010 (N.D. Cal. 1975); *Pennsylvania v. Local Union No. 542*, 347 F. Supp. 268 (E.D. Pa. 1972). This reasoning, of course, eliminates the problem discussed in notes 40-49 and accompanying text, for with the state action requirement eliminated, congressional authority to reach private sex discrimination under the fourteenth amendment would presumably be as broad as its authority to reach racial discrimination under that amendment or under the combined power of both the thirteenth and fourteenth amendments. As discussed in the text following this note, however, these cases have extended the *Guest* rationale too far. The Seventh Circuit's interpretation of this issue is more likely to be accepted should the issue reach the Supreme Court. See *Murphy v. Mt. Carmel High School*, 45 U.S.L.W. 2232 (7th Cir. Oct. 4, 1976).

95. 383 U.S. at 755; *id.* at 762 (Clark, J. concurring); *id.* at 774 (Harlan, J. concurring in part, dissenting in part); *id.* at 780-81 (Brennan, J. concurring in part, dissenting in part). See also note 98 *infra*.

to state facilities, so it can prohibit private individuals from interfering with that access.<sup>96</sup> The concurring opinions, taken together and in context, do not support the proposition that Congress may protect private individuals from discrimination which affects, for example, access to *private* facilities or property.

To date, the Supreme Court has neither reiterated nor applied the theory adopted in the *Guest* concurrences, and it is unlikely that it will do so. Of the Justices who joined in the *Guest* concurring opinions, only one, Justice Brennan, remains on the Court.<sup>97</sup> The others have been replaced by Justices who, for the most part, are less predisposed to broad constitutional interpretation than were Fortas, Warren, or Douglas. Moreover, at least one of the recent appointees to the Court interprets *Guest* to require some connection between state action and private discrimination as a prerequisite to congressional legislation under the fourteenth amendment.<sup>98</sup>

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96. See 383 U.S. at 784 (Brennan, J., concurring in part, dissenting in part):

No one would deny that Congress could enact legislation directing state officials to provide Negroes with equal access to state schools, parks, and other facilities owned or operated by the State. Nor could it be denied that Congress has the power to punish state officers who, in excess of their authority and in violation of state law, conspire to threaten, harass and murder Negroes for attempting to use these facilities. And I can find no principle of federalism nor word of the Constitution that denies Congress power to determine that in order adequately to protect the right to equal utilization of state facilities, it is also appropriate to punish other individuals—not state officers themselves and not acting in concert with state officers—who engage in the same brutal conduct for the same misguided purpose.

See also Cox, *supra* note 80, at 102.

One could well say, "Granted that the prohibitions in section 1 of the fourteenth amendment are addressed only to the states and not to private persons, still the congressional power to enact measures helping to effectuate those prohibitions may include the regulation of private activities where that is a means of implementing the prohibition against the state." For example, a law prohibiting discrimination against Negroes in the sale and rental of housing could well be viewed as a means of bringing about the break-up of the urban ghettos which are serious obstacles to the states' performance of their constitutional duty not to discriminate in the quality of education and other public services.

97. Justices Warren, Douglas, Black, Clark, and Fortas are gone.

98. See the opinion of now Justice Stevens in *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828, n.27 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976). The court found that a conspiracy by a private college to deprive a female faculty member of promotion and salary increases no better satisfied the requirements of section 1985(3) than the



In summary, it appears unlikely that the Supreme Court will uphold federal legislation against private sex discrimination under the fourteenth amendment, absent some connection between that discrimination and the state. Neither *Guest* nor *Morgan* suggests the contrary. Furthermore, the Court is still clearly solicitous of the restraints on federal power imposed by our system of government and has reaffirmed the vitality of the concept of federalism<sup>99</sup> underlying early restrictive interpreta-

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private conspiracy to discriminate irrationally between criminal lawyers and other prospective tenants of office space which was the subject of its previous decision in *Dombrowski v. Dowling*, 459 F.2d 190, 195-96 (7th Cir. 1972). In *Cohen* the court reiterated the interpretation of *Guest* which had served as one basis for its decision in *Dombrowski*.

[A]lthough there was disagreement within the Court on the question whether defendants' private conduct would have been proscribed if there had been no cooperative action by state officers, all members of the Court recognize the need for state involvement in the provision of facilities to which the victims of the conspiracy were denied equal access. In short, the right secured by the Equal Protection clause of the Fourteenth Amendment is a right to protection against unequal treatment by a State.

524 F.2d at 828 n.27.

The *Cohen* court also distinguished *Griffin v. Breckenridge*, 403 U.S.

88 (1971):

The constitutional rights which were vindicated by the Supreme Court's decision in *Griffin* . . . were not mere prohibitions against objectionable state action. That case held that a private conspiracy to deprive the plaintiffs of their Thirteenth Amendment rights, or their right of interstate travel, was actionable under § 1985(3). Neither of those constitutional rights is merely a limitation on state power . . . . We recognize . . . that there is language in *Griffin* which may indicate that the statute will be construed to cover any invidiously discriminatory private conspiracy, and that other circuits, without careful consideration of the issue, have stated that state action is never an element of a § 1985(3) claim. We are satisfied, however, that the distinction between the two kinds of state involvement that may be relevant in civil rights litigation—first, whether the defendant has acted under color of state law, and, second, whether plaintiff's federal right is merely assertable against the State—requires consideration of the state action issue in cases bottomed on an alleged violation of the Fourteenth Amendment.

524 F.2d at 828-29. See also *Bellamy v. Mason's Stores, Inc.*, 508 F.2d 504, 507 (4th Cir. 1974).

This reasoning was extended by *Murphy v. Mt. Carmel High School*, 45 U.S.L.W. 2232 (7th Cir. Oct. 4, 1976), in which the court held that section 5 provided no constitutional authority for Congress to interfere with private infringement of rights protected by the fourteenth amendment and private conspiracies to interfere with first amendment rights were not actionable under section 1985(3).

99. See *National League of Cities v. Usery*, 96 S. Ct. 2465 (1976). But see *Usery v. Bettendorf Community School Dist.*, 423 F. Supp. 637 (S.D. Iowa 1976); *Usery v. Salt Lake City Bd. of Educ.*, 45 U.S.L.W. 2155 (D. Utah Aug. 31, 1976).

tions of the fourteenth amendment. Thus, while Congress may have authority which it has not yet utilized to reach some private conduct, that authority is not plenary; it is constrained by the judicial definition of the state action requirement of section 1.<sup>100</sup>

Because fourteenth amendment prohibitions on private sex discrimination are limited by the state action concept, it is important to isolate those situations in which federal courts have found a close enough connection between private conduct and state action to satisfy the requirement. The definition of state action adopted by the federal courts may determine the applicability of general statutes such as section 1985(3) to particular instances of private sex discrimination<sup>101</sup> and may also suggest the outer limits of congressional authority to enact new legislation against such discrimination under the fourteenth amendment.<sup>102</sup>

## 2. *Definitions of state action under section 1 of the fourteenth amendment.*

An interpretation of the fourteenth amendment that ties legislative authority to the Supreme Court's definition of state action has unfortunate consequences for those who wish to persuade Congress to enact new legislation or the courts to apply existing legislation, such as section 1985(3), to private sex discrimination. The Court is in the process of redefining state ac-

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100. See note 71 *supra*.

101. The state action concept is important to section 1985(3) claims, although this section can be applied as thirteenth amendment legislation, see note 194 *infra*. Plaintiffs may rely on the fourteenth amendment as the source of congressional authority to legislate against private sex discrimination. A court could then apply section 1985(3) only insofar as the challenged discrimination is proscribed by section 1 of the fourteenth amendment. In *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818, 828 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976), a sex discrimination case, Justice Stevens as circuit judge found no connection between the state and the private sex discrimination. Noting that the section 1985(3) claim was based on the fourteenth amendment, which is limited by the state action concept, he dismissed the complaint. See note 46 *supra*. But cf. *Griffin v. Breckenridge*, 403 U.S. 88 (1971), in which the Supreme Court held that constitutional authority for Congress to prohibit the private conduct at issue flowed from both the thirteenth amendment and federal protection of the right to interstate travel. Since private individuals had deprived plaintiff of these federal rights, the conspiracy was actionable under section 1985(3).

102. The state action concept would also determine the scope of congressional authority under the equal rights amendment. See note 55 *supra*.

tion in more restrictive terms than those used in the past. In addition, the concept of state action has always been flexible, which has resulted in sporadic recognition of a definitional double standard that permits courts more easily to find state action in cases claiming race discrimination than in those alleging other types of discrimination.<sup>103</sup> This double standard implies that in sex discrimination cases, "more" state action must exist before the courts will countenance legislative interference with private conduct; this creates a danger that those same courts will restrictively interpret the scope of congressional power to ensure equal treatment for women.

The Supreme Court has yet to settle on a precise definition of state action.<sup>104</sup> Neither descriptions of nor generalizations about the cases in which the Court has found state action satisfactorily predicts the resolution of a state action issue. It is clear, however, that the Court will not discern state action in private conduct as readily as it once did. This reluctance appears even in cases of race discrimination, although in the past the Court willingly scrutinized ostensibly private conduct to prevent the states from perpetuating discrimination by more subtle means than explicitly discriminatory statutes. The 1972 decision in *Moose Lodge No. 107 v. Irvis*<sup>105</sup> was the first since 1935<sup>106</sup> in which the Supreme Court disposed of an allegation of racial discrimination on the ground that no state action could be found.

In *Jackson v. Metropolitan Edison Co.*,<sup>107</sup> the Supreme Court rejected the contention that the termination of services by a privately-owned utility company was state action. This decision demonstrates the Court's new analytical method. Whether state

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103. See text accompanying notes 117-40 *infra*.

104. See Bassett, *The Reemergence of the "State Action" Requirement in Race Relations Cases*, 22 CATH. U.L. REV. 39 (1972); Burke & Reber, *State Action, Congressional Power and Creditors' Rights*, 46 S. CAL. L. REV. 1003, 1034-1109 (1973); Note, *State Action and the Burger Court*, 60 VA. L. REV. 840 (1974) [hereinafter cited as *State Action*]; Note, *State Action: Theories for Applying Constitutional Restrictions to Private Activity*, 74 COLUM. L. REV. 656 (1974). See also Black, *supra* note 66; Van Alstyne & Karst, *State Action*, 14 STAN. L. REV. 4 (1961).

105. 407 U.S. 163 (1972). In *Moose Lodge*, a black guest at a private club was refused service because of his race. The Court held that the state-imposed regulatory scheme enforced by the state liquor board in relation to the club's liquor license did not constitute "state action;" but another regulatory provision, discussed in note 125 *infra*, was held to be state action.

106. *Grove v. Townsend*, 295 U.S. 45 (1935). See *State Action*, *supra* note 104, at 847 n.37.

107. 419 U.S. 345 (1974).

action exists, the Court held, does not depend on the combined effect of state and private entanglements, but rather on whether state involvement in any single aspect of a private individual's conduct amounts to state action. Consequently, the Court evaluated separately each claimed connection between the state and the private utility and concluded that neither the state's grant of monopoly status to Metropolitan Edison, nor the fact that the company provided an essential public service, nor the state's approval of Metropolitan Edison's regulations justified a finding of state action.<sup>108</sup>

*Jackson* also indicated that the existence of state action depends on whether there is a specific nexus between the state's entanglement with a private individual and the alleged discriminatory conduct.<sup>109</sup> The use of this approach may close the federal courts to cases that a few years earlier had satisfied the state action requirement. For example, in *Burton v. Wilmington Parking Authority*,<sup>110</sup> the Court would have had difficulty finding the specific nexus that *Jackson* requires in the simple fact that the city leased building space to a restaurant which had a racially discriminatory service policy. Yet in *Burton* the Supreme Court found state action.

Whether *Jackson's* analytical approach will affect the state action question in race discrimination litigation, or will be limited to cases involving due process claims or other types of discrimination, is problematic.<sup>111</sup> A number of lower federal courts hearing

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108. The Court held that no state action could be discerned, over the objection of the dissenting Justice that: "[i]t is not enough to examine *seriatim* each of the factors upon which a claimant relies and to dismiss each individually as being insufficient to support a finding of state action. It is the aggregate that is controlling." *Id.* at 360. See generally *The Supreme Court, 1974 Term*, 89 HARV. L. REV. 47, 139 (1975).

109. 419 U.S. at 351 (citing *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972)).

110. 365 U.S. 715 (1961).

111. Although the *Jackson* Court specifically relied on state action cases alleging race discrimination in reaching its conclusion, 419 U.S. at 349-51, it did not explicitly mandate application of the *Jackson* analysis to race discrimination cases. Moreover, in *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974), at least two Justices seemed to reject the requirement that a specific nexus be shown between state action and racial discrimination. *Id.* at 582 (White & Douglas, JJ., concurring) ("it is perfectly clear that . . . the State itself need not make, advise, or authorize the private decision to discriminate that involves the State in the practice of segregation or would appear to do so in the minds of ordinary citizens"). Given the additional fact that the standard for testing state action appears to vary according to the type of discrimination, see, e.g.,

sex discrimination cases, however, have unquestioningly adopted both the *Jackson seriatim* method of analysis and the nexus standard,<sup>112</sup> with unfortunate results for plaintiffs.

In *Cohen v. Illinois Institute of Technology*,<sup>113</sup> for example, the fourteenth amendment claim of a plaintiff who alleged sex discrimination in employment by an ostensibly private university was rejected. Judge (now Supreme Court Justice) Stevens held that state action must be established by demonstrating some affirmative state encouragement or approval of the alleged sex discrimination.<sup>114</sup> Stevens also employed the *Jackson seriatim* method of analysis,<sup>115</sup> and considered the alleged connections between the state and the private university in four separate parts: 1) the use of the name of the state; 2) financial and other state support; 3) pervasive state regulation; and 4) failure of the state to take affirmative action to stop the discrimination. Other lower federal courts have similarly relied on *Jackson's seriatim* and nexus analyses, usually without considering whether the standards set forth in *Jackson* are applicable to sex discrimination cases.<sup>116</sup>

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*Jackson v. Statler Foundation*, 496 F.2d 623, 628-29 (2d Cir. 1974); *James v. Pinnix*, 495 F.2d 206, 208 (5th Cir. 1974); *Wahba v. New York Univ.*, 492 F.2d 96 (2d Cir. 1974); *Grafton v. Brooklyn Law School*, 478 F.2d 1137 (2d Cir. 1973); *Kirksey v. Thelig*, 351 F. Supp. 727, 731-32 (D. Colo. 1972), it is conceivable that *Jackson* will not govern racial discrimination cases. In *Golden v. Biscayne Bay Yacht Club*, 530 F.2d 16 (5th Cir. 1976) (*en banc*), *cert. denied*, 97 S. Ct. 186 (1976), however, the court determined that the *Jackson* standard applied to race discrimination on the ground that the Supreme Court, in its *Jackson* opinion, had relied on *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961), and *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), both race discrimination cases.

112. See cases cited in note 116 *infra*.

113. 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976).

114. *Id.* at 824 n.21.

115. *Id.* at 823-26.

116. See, e.g., *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328, 1332 (3d Cir. 1975); *New York City Jaycees, Inc. v. United States Jaycees, Inc.*, 512 F.2d 856, 858-59 (2d Cir. 1975); *Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031, 1033 (8th Cir. 1975). But see *Weise v. Syracuse Univ.*, 522 F.2d 397, 407 n.12 (2d Cir. 1975); *Rackin v. University of Pa.*, 386 F. Supp. 992 (E.D. Pa. 1974), in which the courts rejected both *Jackson* methods. In *Weise*, the court considered five state action factors in the aggregate and noted further that the degree to which the state was involved in the discriminatory activity through regulation was not a *sine qua non* to a finding of state action. 522 F.2d at 407. In *Rackin*, state action was found without a specific nexus since a symbiotic relationship between the private discrim-

Even without following the *Jackson* precedent, lower federal courts have been reluctant to find state action in sex discrimination cases in which, if a claim of racial discrimination were pressed, state action would probably be discerned. In race discrimination cases, the Supreme Court was long ago forced to adopt a sophisticated definition of state action in order to prevent circumvention of the fourteenth amendment, since states often encouraged individuals to carry on what were once state-enforced racially discriminatory policies. But the Court has not yet decided a case in which it has been forced to consider what degree of state involvement in otherwise private sex discrimination constitutes state action.<sup>117</sup> This issue has been raised in lower federal courts,<sup>118</sup> but, in the absence of a Supreme Court decision applying a sophisticated state action analysis to sex discrimination, these courts have been reluctant to follow the precedent set by the race discrimination cases.

Some courts openly adhere to a "double standard" of state

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inator and the state existed. The court also considered the factors pertaining to the state action question in the aggregate. 386 F. Supp. at 1002-04.

117. Every recent sex discrimination case considered by the Supreme Court has challenged a specific statute or regulation which, by its terms, created a classification based on sex. *Craig v. Boren*, 97 S. Ct. 451 (1976) (state statute prohibited sale of 3.2 percent beer to males under 21 and females under 18); *Stanton v. Stanton*, 421 U.S. 7 (1975) (state statute assigned men and women different ages of majority); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975) (men received less survivor's benefits than women under Social Security Act); *Schlesinger v. Ballard*, 419 U.S. 498 (1975) (servicemen treated differently for promotion purposes than servicewomen); *Kahn v. Shevin*, 416 U.S. 351 (1974) (state statute gave widows but not widowers a property tax exemption); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (federal statute gave married servicewomen different dependent benefits than married servicemen); *Reed v. Reed*, 404 U.S. 71 (1971) (state statute gave a preference to men over women when both were otherwise equally qualified for the job as administrator of an estate). See Johnston, *Sex Discrimination and the Supreme Court—1975*, 23 U.C.L.A.L. REV. 235 (1975); Johnston, *Sex Discrimination and the Supreme Court—1971-1974*, 49 N.Y.U.L. REV. 617 (1974).

The Supreme Court may consider the state action question in the near future, since the issue has already been litigated in the lower federal courts in *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974 (1976), and *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976).

118. *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66 (2d Cir.), cert. denied, 425 U.S. 974 (1976); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976); *Magill v. Avonworth Baseball Conference*, 516 F.2d 1328 (3d Cir. 1975).

action in fourteenth amendment litigation. A district court, for example, discussing the merits of a sex discrimination claim in *King v. Little League Baseball, Inc.*,<sup>119</sup> stated:

If the present case concerned racial discrimination, defendant Little League, like the boys' club in *Statom* [v. Board of Commissioners, 233 Md. 57, 195 A.2d 41 (1963)] might well be deemed to have acted under color of law. But state action is found more readily when racial discrimination is in issue than when other rights are asserted.<sup>120</sup>

Instances of open adherence to a double standard are, however, rare. Far more numerous are the courts that do not openly advert to, but whose conclusions suggest the existence of a double standard. The Court of Appeals for the Second Circuit, for example, has been equivocal. On the one hand, it has acknowledged that a double standard exists;<sup>121</sup> on the other hand, it has purported to apply the same standard in sex discrimination cases that it would apply in race cases. In *Girard v. 94th Street & Fifth Avenue Corporation*,<sup>122</sup> for example, the court stated that it was

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119. 505 F.2d 264 (6th Cir. 1974).

120. This is the district court's language, reported *id.* at 266. The court of appeals affirmed the trial court, but did not adopt the quoted language, relying instead "upon a more immediate basis for affirmance." *Id.* at 267.

The Court of Appeals for the Fifth Circuit has also implied that there may be a double standard on the state action issue. In a case challenging a hospital's elective abortion policy under the fourteenth amendment, the court declined to find state action by stating that the "most obvious distinguishing factor [between *Burton v. Wilmington Parking Authority* and the case at hand] is that Orange Memorial Hospital is not accused of racial discrimination." *Greco v. Orange Memorial Hosp. Corp.*, 513 F.2d 873 (5th Cir.), *cert. denied*, 423 U.S. 1000 (1975). Compare *Simkins v. Moses H. Cone Memorial Hosp.*, 323 F.2d 959 (4th Cir. 1963), *cert. denied*, 373 U.S. 938 (1964) (race discrimination; receipt and use of Hill-Burton funds by private hospital amounts to state action) with the approach of the district court which was reversed in *Doe v. Charleston Area Medical Center, Inc.*, 529 F.2d 638 (4th Cir. 1975) (abortion; district court had held receipt and use of Hill-Burton funds does not amount to state action; court of appeals reversed, finding state action). See also *Taylor v. St. Vincent's Hosp.*, 523 F.2d 75 (9th Cir. 1976), *cert. denied*, 424 U.S. 948 (1976); *Doe v. Bellin Memorial Hosp.*, 479 F.2d 756 (7th Cir. 1973) (abortion; receipt and use of Hill-Burton funds does not amount to state action).

121. See *Weise v. Syracuse Univ.*, 522 F.2d 397, 406 (2d Cir. 1975) ("Plaintiffs contend that we should put sex discrimination in the same category of offensiveness as race discrimination. We are not, however, engaged in an all-or-nothing, pigeon-hole form of jurisprudence, and it is not necessary [to decide that issue in this case]."). See also text accompanying note 134 *infra*.

122. 530 F.2d 66 (2d Cir.), *cert. denied*, 425 U.S. 974 (1976).

using the same, less onerous, state action test used in race discrimination cases, but the finding of no state action casts doubts on the accuracy of the court's characterization of its standard. The plaintiff in *Girard* had alleged that the board of directors of a cooperative apartment building refused to consent to the assignment of a lease to her solely because she was a woman. Although a state court had enforced the board's refusal, albeit perhaps without knowledge of the reasons for it, the court of appeals found no state action which would subject the board of directors to the proscription of the fourteenth amendment.

The facts in *Girard* paralleled those in *Shelley v. Kraemer*,<sup>123</sup> a case in which the Supreme Court found state action in the state judiciary's enforcement of a racially restrictive covenant regulating the sale of land. The Court of Appeals for the Second Circuit distinguished the factual situation in *Shelley* on the following grounds:

The contested provision in *Shelley* was racially discriminatory on its face. The lease provision in question here, requiring consent of the board of directors before transfer is effective, can only be described as neutral; there is no suggestion of any prohibition of transfer of ownership on the basis of sex.<sup>124</sup>

Since the Supreme Court has never made the state's knowledge or intent to discriminate the determinative factor in evaluating the state action issue, the distinction drawn by the Second Circuit is hardly significant enough to merit a different outcome than that in *Shelley*. One might reasonably conclude that the Court of Appeals for the Second Circuit, in spite of its language, was using a double standard.<sup>125</sup>

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123. 334 U.S. 1 (1948).

124. *Girard v. 94th St. & Fifth Ave. Corp.*, 530 F.2d 66, 69 (2d Cir.), cert. denied, 425 U.S. 974 (1976).

125. This is not to say that the result reached in *Girard* is not supportable on any other grounds, but simply that there is no basis for the distinction which the court chose to make. If the Supreme Court had considered intent dispositive of the state action issue, the facially non-discriminatory state liquor license regulations in *Moose Lodge No. 107 v. Irvis*, 407 U.S. 163 (1972), would have shielded the private discrimination of the club from the restraints of the fourteenth amendment, instead of furnishing the Court with a reason for finding state action. In *Moose Lodge*, a liquor control board regulation that required all private clubs to adhere to their own by-laws was held to give rise to state action under the fourteenth amendment when a by-law of a private club prohibited serving blacks. But see note 105 *supra*. See also *Burton v. Wilmington Parking Authority*, 365 U.S. 715 (1961) (state action was found in the fact that the state leased space to a private restaurant which turned out to have a racially discriminatory service policy); *Jackson v. Metropolitan*



Another example illustrates the point. In *Gilmore v. City of Montgomery*,<sup>126</sup> the Supreme Court stated that if government, rather than merely making public facilities available to private segregated organizations, becomes involved, for example, in the scheduling process for use of the public facilities, state action may be present.<sup>127</sup> In spite of *Gilmore*, the Court of Appeals for the Third Circuit, in *Magill v. Avonworth Baseball Conference*,<sup>128</sup> found no state action in an arrangement which gave the Avonworth Baseball Conference, a state-chartered, private, non-profit organization which refused to admit girls, access to public baseball fields. This finding was made in spite of the facts that: 1) the fee which was normally charged for use of public facilities was waived in the case of the Conference; 2) the Conference could not operate without the use of public facilities; and 3) the Avonworth School Board permitted the Conference to use school facilities for advertising purposes, for its annual organizational meeting, and for registration for the Conference.<sup>129</sup>

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Edison Co., 419 U.S. 345 (1974). In *Jackson*, the Court required a showing of a specific nexus between the state and the private discrimination; this could be interpreted as incorporating a knowledge requirement into the state action analysis and might be used to support the outcome in *Girard*. Unless the same nexus limitation is used in race discrimination cases, however, a double standard would still exist.

126. 417 U.S. 556 (1974).

127. If . . . the city or other governmental entity rations otherwise freely accessible recreational facilities, the case for state action will naturally be stronger than if the facilities are simply available to all comers without condition or reservation. Here, for example, petitioners allege that the city engages in scheduling soft-ball games for an all-white church league and provides balls, equipment, fields, and lighting. The city's role in that situation would be dangerously close to what was found to exist in *Burton* . . . .

*Id.* at 574.

128. 516 F.2d 1328 (3d Cir. 1975).

129. *But see* Fortin v. Darlington Little League, Inc., 514 F.2d 344, 347 (1st Cir. 1975) (citing *Gilmore v. City of Montgomery*, 417 U.S. 556 (1974)) (city's rationing of parks primarily for the Little League amounted to state action).

Other instances exist in which courts faced with sex discrimination claims have reached conclusions which appear to conflict with those reached in similar cases involving race discrimination. Compare *Junior Chamber of Commerce of Kansas City v. Missouri State Junior Chamber of Commerce*, 508 F.2d 1031 (8th Cir. 1975) (no state action, although 45 percent of all money received and distributed by United States Jaycees came from federal government and was used to train only men for future civic and business responsibilities), and *Junior Chamber of Commerce of Rochester v. United States Jaycees*, Tulsa, Okla., 495 F.2d 883 (10th Cir.), *cert. denied*, 419 U.S. 1026 (1974) (no state action although

Some courts, of course, have reached the same state action findings in similar sex and race discrimination cases,<sup>130</sup> and it may be argued that the inconsistencies described above are simply a manifestation of the confusion which exists with respect to all state action litigation.<sup>131</sup> The inconsistencies are, however, sufficiently numerous to prompt consideration of whether different treatment of the state action issue in race and sex discrimination cases is justifiable. The conclusion reached may affect interpretations of the scope of congressional authority under section 5 of the fourteenth amendment.<sup>132</sup>

The basis for the proposition that state action standards should vary with the type of discrimination is relatively plain. According to one influential proponent of a double standard, racial discrimination is an invidious, reprehensible practice which, if unchecked, will have a profound effect on the nation; judicial scrutiny of racially discriminatory conduct must therefore be particularly rigorous.<sup>133</sup> A similar rationale is given by the Court of Appeals for the Second Circuit:

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defendant male-only organization received tax benefits, federal contracts and \$985,000 in federal monies), *with* *McGlotten v. Connally*, 338 F. Supp. 448 (D.D.C. 1972) (state action in tax exemption for racially discriminatory fraternal order) *and* *Smith v. Young Men's Christian Ass'n of Montgomery, Inc.*, 462 F.2d 634 (5th Cir. 1972) (state action in racially discriminatory policies of YMCA because it enjoyed tax-exempt status, utilized city property, conducted recreational programs for the public, and derived 20 percent of its income from the city). *See also* *Norwood v. Harrison*, 413 U.S. 455 (1973) (state's provision of free textbooks to racially segregated private schools constituted state action); *Cohen v. Illinois Inst. of Technology*, 524 F.2d 818 (7th Cir. 1975), *cert. denied*, 425 U.S. 943 (1976) (sex discrimination; school received state financial support and benefit from state's powers of eminent domain, but no state action found).

130. *Compare* *Adickes v. S.H. Kress & Co.*, 398 U.S. 144 (1970) (race discrimination; city enforced trespass laws against customer of segregated restaurant), *with* *Johnson v. Heineman Candy Co., Inc.*, 402 F. Supp. 714 (E.D. Wis., 1975) (sex discrimination; city agreed to handle male-only restaurant's private prosecution of women customers). *See also* *Terry v. Adams*, 345 U.S. 461 (1953) (race discrimination by ostensibly private group which performed essential political function); *Smith v. Allwright*, 321 U.S. 649 (1943); *Korzenik v. Marrow*, 401 F. Supp. 77 (S.D.N.Y. 1975) (sex discrimination by private group performing essential political function).

131. The question may be further confused by the possibility that the different results reached depend on whether it is the state itself that is sued or simply the private discriminator. *See* *Yackle*, *supra* note 74, at 522-23 n.175.

132. *See* text following note 103 *supra*.

133. *Black*, *supra* note 66, at 69-70. *See also* H. FRIENDLY, *THE DARTMOUTH COLLEGE CASE AND THE PUBLIC-PRIVATE PENUMBRA* 21 (1969).

[A] consideration of whether there is state action necessarily entails a balancing process. . . . As the conduct complained of becomes more offensive, and as the nature of the dispute becomes more amenable to resolution by a court, the more appropriate it is to subject the issue to judicial scrutiny. This explains the willingness to find state action in racial discrimination cases although the same state-private relationship might not trigger such a finding in a case involving a different dispute over a different interest. Class-based discrimination is perhaps the practice most fundamentally opposed to the stuff of which our national heritage is composed, and by far the most evil form of discrimination has been that based on race. It should hardly be surprising, then, that in race discrimination cases courts have been particularly vigilant in requiring the states to avoid support of otherwise private discrimination, and that where the conduct has been less offensive a greater degree of tolerance has been shown.<sup>134</sup>

Most courts and individuals that advert to this proposition buttress their argument by citing the historical purpose of the fourteenth amendment to prevent racial discrimination.<sup>135</sup> In effect, they adopt an approach to fourteenth amendment interpretation that limits the scope of the amendment precisely to its original intent, an interpretation which the Supreme Court has not adopted.<sup>136</sup>

Until recently, it could have been persuasively urged that because charges of race discrimination received stricter scrutiny on the merits of the equal protection claim than charges of other

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134. *Weise v. Syracuse Univ.*, 522 F.2d 397, 406 (2d Cir. 1975) (Smith, J.) (citations omitted). See also the statement made by Justice Stevens during his nomination hearings that "I think [blacks] are a more disadvantaged group in the history of our Country than the half of the population that is female." *Nomination of John Paul Stevens to be a Justice of the Supreme Court: Hearings before the Senate Committee on the Judiciary*, 94th Cong., 1st Sess. at 16 (1975).

135. See *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 51-54 (1872); Black, *supra* note 66, at 70-71. Although addressed to another aspect of fourteenth amendment interpretation, the following remarks are illuminating:

I limit this generalization to the racial question on the assumption already stated that the fourteenth amendment marks racial groups . . . as groups against whose interest in immunity from discrimination no state measures of any kind may be justified . . . . On the other hand, a [state] constitutional provision forbidding the legislature and subdivisions of California from interfering with discrimination in housing, so long as that discrimination were based on sex . . . would not fall within the principle put forward. Such a provision might be 'arbitrary' and so fall under either a due process or generalized equal protection ban. But women [do not] enjoy any general federal constitutional immunity against all state measures placing them at any disadvantage.

*Id.* at 82.

136. See, e.g., *Weber v. Aetna Cas. & Ins. Co.*, 406 U.S. 164, 178-79 (1972) (Rehnquist, J., dissenting); *Oregon v. Mitchell*, 400 U.S. 112, 126-27 (1970).

types of class discrimination, the Supreme Court would similarly scrutinize the state action issue. At least with respect to sex discrimination, however, that argument is no longer supportable. The terminology of "strict scrutiny" and "suspect classifications" may linger, but it is apparent from recent Supreme Court decisions that the Court is abandoning its practice of converting a description of the type of discriminatory classification into a pre-judgment of the constitutionality of that classification.<sup>137</sup> Litigants claiming a denial of equal protection on the basis of sex have found the Court willing to closely analyze the government's justifications for its law.<sup>138</sup> Thus, in spite of the historical purpose of the fourteenth amendment, the Court looks carefully at class discrimination based on factors other than race.<sup>139</sup> If the

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137. The Supreme Court appears to be developing a standard more rigorous than the "rational relationship" test for some cases which do not warrant strict scrutiny. See Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 17-18 (1972); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974). In particular, the Supreme Court's approach in *Reed v. Reed*, 404 U.S. 71, 76-77 (1971), and its application of *Reed* to other sex discrimination cases, such as *Craig v. Boren*, 97 S. Ct. 451 (1976), indicates that the "two-tiered" equal protection analysis is in disfavor. Cf. *Craig v. Boren*, 97 S. Ct. 451, 467 (1976) (Rehnquist, J. dissenting) (Justice Rehnquist argues that discrimination against women should be more carefully scrutinized than that against men. The majority of the Court preferred to give equal scrutiny to discrimination claims of both sexes.). One might still argue that sex classifications should be denominated "suspect" and that their denomination as such should affect the outcome of sex discrimination litigation, but it is not the purpose here to resolve that debate. The point is simply that the question is not as critical as has sometimes been assumed. Compare, for example, Mr. Justice Douglas's opinions in *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973), and *Schlesinger v. Ballard*, 419 U.S. 498, 511 (1975) (dissenting opinion), where he maintained that sex classifications are suspect, with his position in *Kahn v. Shevin*, 416 U.S. 351 (1975), in which he upheld the validity of a classification based on sex.

138. See, e.g., *Craig v. Boren*, 97 S. Ct. 451 (1976); *Weinberger v. Weisenfeld*, 419 U.S. 822 (1975); *Schlesinger v. Ballard*, 419 U.S. 498 (1975). In none of these cases did the Supreme Court characterize sex as a suspect classification, but in each it carefully scrutinized the government's rationale for the classification.

139. The Supreme Court has in the past indicated that the legal status of women was "different" and that the fourteenth amendment privileges and immunities clause therefore did not protect them to the same extent that it might protect other citizens. *Bradwell v. State*, 83 U.S. (16 Wall.) 130, 139 (1873) (Bradley, J., concurring) (the right to practice law is not one of the privileges and immunities of a woman's citizenship). In addition, in *In re Lockwood*, 154 U.S. 116 (1894), the Supreme Court upheld the right of Virginia to construe "person" as includ-

historical purpose argument does not prevent close judicial scrutiny when a plaintiff alleges a denial of equal protection solely on the basis of sex, it should not be resurrected to justify a "double standard" in deciding state action issues.

There is room for hope that any temptation to treat state action issues differently in race and sex discrimination cases will be resisted. There are courts that have recognized the possibility that some forms of discrimination will give rise to a finding of state action more easily than others, but have found no reason to distinguish between race and sex discrimination.<sup>140</sup> The courts that make such a distinction, however, may carry it over to interpretations of congressional authority to legislate pursuant to section 5 of the fourteenth amendment.

### 3. Conclusion

The state action limitation in section 1 of the fourteenth amendment of the Constitution does not totally bar Congress from regulating private sex discrimination. As long as that discrimination is linked to state action, Congress can probably prohibit it. There is little reason to believe, however, that the Supreme Court itself will ever ignore, or permit Congress to ignore, the state action limitation; judicial definitions of state action will therefore restrict the type of legislation that can constitutionally be enforced against private sex discrimination. Because judicial definitions of state action have narrowed in recent years and because the judiciary has, at times, utilized a double standard for sex discrimination cases, congressional authority to legislate against private sex discrimination under the fourteenth amendment may be insufficient to fully protect women.<sup>141</sup>

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ing only males and thus prevent the female petitioner from practicing law in that state. Neither of these decisions, however, could be justified under any of the current forms of equal protection analysis. See *Schlesinger v. Ballard*, 419 U.S. 498 (1975); *Frontiero v. Richardson*, 411 U.S. 677 (1973); *Reed v. Reed*, 404 U.S. 71 (1971).

140. See, e.g., *Korzenik v. Marrow*, 401 F. Supp. 77, 81 (S.D.N.Y. 1975); *Girard v. 94th St. & Fifth Ave. Corp.*, 396 F. Supp. 450 (S.D.N.Y. 1975), *aff'd*, 530 F.2d 66 (2d Cir. 1976); *New York City Jaycees v. United States Jaycees*, 377 F. Supp. 481, 488 (S.D.N.Y. 1974), *rev'd*, 512 F.2d 856 (2d Cir. 1975); *Stern v. Massachusetts Indem. & Life Ins. Co.*, 365 F. Supp. 433, 439 (E.D. Pa. 1973).

Brown and his colleagues in their discussion of the equal rights amendment take the position that the rights involved rather than the class claiming discriminatory treatment should affect the amount of state action the plaintiff must demonstrate. *The Equal Rights Amendment*, *supra* note 55, at 905-06.

141. The narrowing of the judicial definition of state action might

Were the equal rights amendment ratified, and the importance of equal rights for women publicly acknowledged, the existence of a double standard under the fourteenth amendment could not limit legislation prohibiting private sex discrimination. The equal rights amendment contains an enforcement clause that would give Congress the same authority to legislate against sex discrimination as the fourteenth amendment gives against racial discrimination. Even under the equal rights amendment, however, if the court's analysis of the state action issue adopted in *Jackson* were engrafted onto the new amendment's enforcement clause, congressional power to prohibit private sex discrimination would still be strictly limited.

There is, however, another source of congressional power, for the most part ignored by the courts, which may make arguments pertaining to congressional authority under either the fourteenth or the equal rights amendment merely academic. Because the thirteenth amendment contains no state action requirement, it could provide a firm basis for congressional attacks on private sex discrimination.

#### B. THE THIRTEENTH AMENDMENT

Recent Supreme Court interpretations of the thirteenth amendment<sup>142</sup> appear to recognize extensive congressional authority to legislate against all private discrimination.<sup>143</sup> The principle that Congress may reach private conduct under the thirteenth amendment was early established by the Supreme Court.<sup>144</sup> Within the last ten years, the Court has expansively interpreted the amendment to permit Congress to enact legislation affecting a broad range of private deprivations of "fundamental rights which are the essence of civil freedom."<sup>145</sup>

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have some effect on the enforcement of the equal rights amendment, although the judicial implementation of a double standard should not. See text following note 140 *supra*.

142. Section 1. Neither slavery nor involuntary servitude, except as a punishment for crime whereof the party shall have been duly convicted, shall exist within the United States, or any place subject to their jurisdiction.

Section 2. Congress shall have power to enforce this article by appropriate legislation.

U.S. CONST. amend. XIII.

143. See text accompanying notes 157-66 *infra*.

144. Civil Rights Cases, 109 U.S. 3, 23 (1883).

145. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968) (quoting Civil Rights Cases, 109 U.S. 3, 22 (1883)). See text accompanying notes 158-61 *infra*.

The Supreme Court has long emphasized that the thirteenth amendment does not apply only to members of the black race. In fact, the same Court that doubted that the equal protection clause of the fourteenth amendment would ever be interpreted to prohibit any action of a state "not directed by way of discrimination against the negroes as a class, or on account of their race,"<sup>146</sup> stated with respect to the thirteenth amendment:

We do not say that no one else but the negro can share in this protection. Both the language and the spirit of these articles are to have their fair and just weight in any question of construction. Undoubtedly while negro slavery alone was in the mind of the Congress which proposed the thirteenth article, it forbids any other kind of slavery, now or hereafter.<sup>147</sup>

The amendment, according to the Court, was "a denunciation of a condition and not a declaration in favor of a particular people."<sup>148</sup>

At the same time that it established the application of the thirteenth amendment to all persons, however, the Supreme Court strictly construed congressional power to reach only the eradication of the specific conditions of slavery and involuntary servitude. The thirteenth amendment was viewed merely as the constitutional means for prohibiting slavery and involuntary servitude as institutions; the Court identified the fourteenth amendment as the constitutional prohibition of simple racial discrimination.<sup>149</sup>

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146. *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 81 (1872).

147. *Id.* at 72.

148. *Hodges v. United States*, 203 U.S. 1, 16-17 (1906). See also *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911); *Civil Rights Cases*, 109 U.S. 3, 23 (1883).

149. See, e.g., *Plessy v. Ferguson*, 163 U.S. 537, 542 (1896); *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 70 (1872). Notwithstanding suggestions to the contrary in the legislative history, see, e.g., ten Broek, *Thirteenth Amendment of the Constitution of the United States*, 39 CALIF. L. REV. 171 (1951), the view that the thirteenth amendment prohibited only slavery and involuntary servitude, and not discriminations of lesser gravity, is implicit in later Supreme Court decisions upholding federal legislation against peonage, *Clyatt v. United States*, 197 U.S. 207 (1905), and outlawing state statutes enforcing compulsory labor, *Bailey v. Alabama*, 219 U.S. 219 (1911). As late as 1926 this view still persisted. In that year, the Court in *Corrigan v. Buckley*, 271 U.S. 323, 330 (1926), cited *Hodges v. United States*, 203 U.S. 1 (1906), for the proposition that "the Thirteenth Amendment denouncing slavery and involuntary servitude, that is, a condition of enforced compulsory service of one to another, does not in other matters protect the individual rights of persons of the negro race." In *Corrigan*, a racially restrictive covenant limiting the sale of property was at issue.

In *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968), the Court read the *Civil Rights Cases*, 109 U.S. 3 (1883), as an early recognition

The early thirteenth amendment decisions of the Supreme Court were not, however, unanimous. The proposition that the thirteenth amendment simply abolished slavery or involuntary servitude was strongly opposed by Justice Harlan, who argued in the *Civil Rights Cases* that if one were to accept the majority's position that Congress had thirteenth amendment authority only to abolish slavery, section 2 of the amendment would be superfluous.<sup>150</sup> Despite Harlan's position that there were certain rights "necessarily inhering in freedom"<sup>151</sup> which the thirteenth amendment protects, the majority of the Supreme Court found the Louisiana statute in *Plessy v. Ferguson* constitutional because "a legal distinction between the white and colored races [included in the statute] . . . has no tendency to destroy the

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of congressional authority to legislate against private discrimination not amounting to the imposition of slavery or involuntary servitude, but that broad reading is not precisely correct. See text accompanying notes 157-62 *infra*. In the *Civil Rights Cases*, 109 U.S. at 22, the Supreme Court, in discussing legislative action taken for the protection of blacks, had noted:

Congress, as we have seen, by the Civil Rights Bill of 1866, passed in view of the Thirteenth Amendment . . . , undertook to wipe out these burdens and disabilities, the necessary incidents of slavery, constituting its substance and visible form; and to secure to all citizens of every race and color, and without regard to previous servitude, those fundamental rights which are the essence of civil freedom, namely, the same right to make and enforce contracts, to sue, be parties, give evidence, and to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens. . . . [At] that time (in 1866) Congress did not assume, under the authority given by the Thirteenth Amendment, to adjust what may be called the social rights of men and races in the community; but only to declare and vindicate those fundamental rights which appertain to the essence of citizenship, and the enjoyment or deprivation of which constitutes the essential distinction between freedom and slavery.

The Court, however, was only describing the civil rights legislation. It did not specifically decide "whether this legislation was fully authorized by the Thirteenth Amendment alone, without the support which it afterward received from the Fourteenth Amendment . . . ." *Id.* Moreover, the Court went on to note that the thirteenth amendment "simply abolished slavery," *id.* at 23, that the power of Congress under the thirteenth amendment only extended to "slavery and its incidents," *id.*, and that "mere discriminations on account of race or color" were not badges of slavery, *id.* at 25. The final holding of the decision, that Congress had no authority to legislate against private discrimination in the furnishing of public accommodations calls into question any interpretation that would find in the *Civil Rights Cases* an endorsement of broad congressional authority under the thirteenth amendment to reach discrimination that fell short of slavery or servitude. In light of *Jones*, however, that authority is now firmly established.

150. *Civil Rights Cases*, 109 U.S. 3, 34-35, 37 (1883).

151. *Plessy v. Ferguson*, 163 U.S. 537, 555 (1896) (dissenting opinion).



legal equality of the two races, or reestablish a state of involuntary servitude."<sup>152</sup> Similarly in *Hodges v. United States*,<sup>153</sup> the Court rejected Harlan's argument that the thirteenth amendment protected the right of black persons to work,<sup>154</sup> while in the *Civil Rights Cases*<sup>155</sup> the Court did not agree with Harlan that the thirteenth amendment gave Congress the right to legislate against private discrimination in public accommodations.<sup>156</sup> Within the last ten years, however, dating from the landmark decision in *Jones v. Alfred H. Mayer Co.*,<sup>157</sup> the Supreme Court has adopted Harlan's position.

In *Jones*, the Supreme Court, stating that "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation,"<sup>158</sup> upheld the constitutionality of a federal statute which

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152. *Id.* at 543.

153. 203 U.S. 1 (1906).

154. *Id.* at 20, 35-36.

155. 109 U.S. 3 (1883).

156. Harlan was not the only Justice who would have interpreted the thirteenth amendment to prohibit more than just the institution of slavery. Justice Day joined him in dissent in *Hodges v. United States*, 203 U.S. 1, 20 (1906). In a dissent to the *Slaughterhouse Cases*, 83 U.S. (16 Wall.) 36, 90 (1872), Justices Field and Bradley argued that the right to pursue a chosen occupation was secured by the thirteenth amendment. Moreover, Justices Bradley and Swayne, sitting as circuit judges, adopted a broad interpretation of the thirteenth amendment in *United States v. Rhodes*, 27 F. Cas. 785 (C.C. Ky. 1866) (No. 16,151), and *United States v. Cruikshank*, 25 F. Cas. 707 (C.C. La. 1874) (No. 14,896), *aff'd*, 92 U.S. 542 (1875). See also the dissent of Justices Bradley and Swayne in *Blyew v. United States*, 80 U.S. 581 (1871).

157. 392 U.S. 409 (1968). Legislative history supports the *Jones* interpretation. See Buchanan (pt. 1), *supra* note 41, at 1-34. Buchanan concludes from his discussion of the legislative history that both proponents and opponents of the amendment interpreted it very expansively:

While the congressional debates strongly support the conclusion that the thirteenth amendment was intended to protect all races, secure equal protection under the law to all racial groups, and confer on Congress a broad power to define and prohibit badges of slavery, other conclusions emerge less clearly. The debates hint at the existence of congressional power to regulate *private* acts of discrimination. . . . Moreover, the debates suggest the existence of a still more pervasive congressional power—the power to regulate private acts of discrimination based on factors other than race. The prophecies of wives becoming equal to their husbands and women equal to men [CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864)] evince congressional awareness that the badge-of-slavery concept might well embrace all acts, whether private or governmental, based on any form of arbitrary class prejudice.

*Id.* at 22 (citations omitted). See also ten Broek, *supra* note 149.

158. 392 U.S. at 440. The Court applied the test of congressional au-

had been applied to prohibit private racial discrimination in the sale of property. According to the Court, "the badges and incidents of slavery—its 'burdens and disabilities'—included restraints upon 'those fundamental rights which are the essence of civil freedom, namely, the same right . . . to inherit, purchase, lease, sell and convey property, as is enjoyed by white citizens.'" <sup>159</sup> By specifically overruling the restrictive interpretation of congressional power in *Hodges*,<sup>160</sup> the Supreme Court recognized, as did Harlan's early dissents, that the thirteenth amendment authorized Congress to protect "fundamental rights which are the essence of civil freedom."<sup>161</sup>

Subsequent decisions have affirmed the Court's discussion in *Jones* of Congress's expansive authority under the thirteenth amendment.<sup>162</sup> The only questions voiced since *Jones* have been those of Justices White and Rehnquist writing in dissent in *Runyon v. McCrary*.<sup>163</sup> In *Runyon*, the majority of the Supreme Court permitted blacks who had been excluded from private schools solely because of their race to sue for relief under 42 U.S.C. section 1981. The only reference to whether Congress has the power to prohibit that form of private discrimination was a brief statement that *Jones* had recognized congressional authority rationally to determine what constitutes the badges and incidents of slavery.<sup>164</sup> Justices White and Rehnquist did not question the power of Congress to ban racial discrimination in private schools<sup>165</sup> but merely the assumption, which they believed implicit in the Court's language, that Congress has authority to legislate against

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thority articulated in *McCulloch v. Maryland*, 17 U.S. (4 Wheat.) 316, 421 (1819). *Id.* at 443.

159. 392 U.S. at 441. In support of this statement, the Court cited to some rather ambiguous language in the *Civil Rights Cases*. See note 149 *supra* and accompanying text.

160. 392 U.S. at 411 n.78.

161. *Id.* at 441.

162. *Runyon v. McCrary*, 96 S. Ct. 2586, 2594 (1976); *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971) (the reference in *Griffin* to "class-based" discrimination may imply that the thirteenth amendment protections extend to non-racial classes; see note 43 *supra*). Affirmance is implicit in other decisions such as *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), and *Tillman v. Wheaton-Haven Recreational Ass'n*, 410 U.S. 431 (1973). No Justice has pursued the limited dissent in *Jones*, ironically written by another Justice Harlan, which questioned the majority's expansive interpretation of the thirteenth amendment. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 476-77 (1968).

163. 96 S. Ct. 2586, 2613-14 (1976).

164. *Id.* at 2594.

165. *Id.* at 2605 n.2.

"every racially motivated refusal to contract by a private individual."<sup>166</sup> Thus, while there may be some disagreement as to precisely which deprivations constitute the imposition of a badge of slavery, all the Justices concluded that Congress has greater authority than that recognized in the early thirteenth amendment decisions.<sup>167</sup>

Taking into account only the cases discussed so far, it is still far from certain that the amendment authorizes Congress to prohibit private sex discrimination. Arguably these decisions permit Congress to define for itself the badges and incidents of slavery, but it still cannot completely disregard the past legal status of the class of persons it decides to protect from private discrimination. In *United States v. Harris*,<sup>168</sup> for example, the Supreme Court held that Congress had exceeded its authority under the thirteenth amendment by enacting a statute that could be applied to protect free white persons against discrimination.<sup>169</sup> *Jones*, which established the broad authority of Congress to define the badges and incidents of slavery, arose out of a case of private racial discrimination, and the decision heavily emphasized the past legal status of blacks.<sup>170</sup> Thus, based on these decisions, one might reasonably take the position that, while Congress can define the badges and incidents of slavery, it can do so only if those badges and incidents are connected with a past legal status amounting to slavery or involuntary servitude.<sup>171</sup>

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166. Justices White and Rehnquist felt it doubtful that all such refusals could be considered badges or incidents of slavery within Congress' proscriptive power under the Thirteenth Amendment. A racially motivated refusal to hire a Negro or a white babysitter or to admit a Negro or a white to a private association cannot be called a badge of slavery . . .

*Id.* at 2613.

167. See generally *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

168. 106 U.S. 629 (1882).

A law under which two or more free white persons could be punished for conspiring . . . for the purpose of depriving another free white citizen of a right accorded by the law of the state to all classes of persons . . . clearly cannot be authorized by the amendment which simply prohibits slavery and involuntary servitude.

*Id.* at 641.

169. The Court questioned the rationale of *Harris* in *Griffin v. Breckenridge*, 403 U.S. 88, 104 (1971), but did not discuss the assumption that Congress could not reach white persons under the thirteenth amendment.

170. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441-43 (1968).

171. See *Buchanan* (pt. 7), *supra* note 41, at 882 (the *Jones* definition of a badge of slavery may depend "on the showing of a historical link between the victimized class receiving congressional protection and slavery as it existed in the antebellum South"); Note, *The "New" Thirteenth Amendment: A Preliminary Analysis*, 82 HARV. L. REV. 1294, 1308 (1969).

Under this interpretation, the Court's recent thirteenth amendment decisions give Congress authority to legislate against private sex discrimination depriving women of fundamental rights only insofar as that deprivation stems from or perpetuates a past legal condition that can be equated with slavery or involuntary servitude. An argument that women's past legal status is comparable to that of blacks can be made,<sup>172</sup> although in fourteenth amendment litigation it has been difficult to persuade courts to accept the comparison.<sup>173</sup> This approach, however, appears unnecessary in light of the Supreme Court's opinion in *McDonald v. Santa Fe Trail Transportation Co.*<sup>174</sup> The Court's *McDonald* decision must be read as holding that Congress has the power to prohibit particular types of private discrimination regardless of the past or current legal status of the class to which the victimized individual belongs.

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172. See generally L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969); G. MYRDAL, *AN AMERICAN DILEMMA* 1073-78 (1962); Johnston, *Sex and Property: The Common Law Tradition, the Law School Curriculum, and Developments Toward Equality*, 47 N.Y.U.L. REV. 1033 (1972). In studying the legal status of women for purposes of thirteenth amendment interpretation, the focus must often be on married women. Although single women were not directly burdened by every legal disability imposed upon married women, the stereotypes perpetuated by those disabilities affected the legal rights of all women in the same way that the system of southern slavery, which was not imposed on all blacks, nonetheless indirectly limited their legal rights. See, e.g., *Breedlove v. Suttles*, 302 U.S. 277, 282 (1937); *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1872) (Bradley, J., concurring).

173. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973), the closest the Court has come to majority recognition of the comparison in fourteenth amendment litigation.

There can be no doubt that our Nation has had a long and unfortunate history of sex discrimination. Traditionally, such discrimination was rationalized by an attitude of "romantic paternalism" which, in practical effect, put women, not on a pedestal, but in a cage. . . . As a result of notions such as these, our statute books gradually became laden with gross, stereotyped distinctions between the sexes and, indeed, throughout much of the 19th century the position of women in our society was, in many respects, comparable to that of blacks under the pre-Civil War slave codes. Neither slaves nor women could hold office, serve on juries, or bring suit in their own names, and married women traditionally were denied the legal capacity to hold or convey property or to serve as legal guardians of their own children. . . . And although blacks were guaranteed the right to vote in 1870, women were denied even that right—which is itself "preservative of other basic civil and political rights"—until adoption of the Nineteenth Amendment half a century later.

*Id.* at 684-85. With this position, compare *Craig v. Boren*, 97 S. Ct. 451 (1976).

174. 96 S. Ct. 2574 (1976).

In *McDonald*, a white employee, who had allegedly been discharged because of his race, sued his employer under 42 U.S.C. section 1981 for denying him the right to contract, solely on the basis of race. Based on legislative history, the Supreme Court determined that the language of section 1981 proscribed discrimination against whites as well as blacks. The Court did not even bother to discuss the authority of Congress to enact a statute prohibiting private discrimination against whites, although in its 1883 decision in *United States v. Harris* the Court had observed that the thirteenth amendment could not apply to white persons.<sup>175</sup> It simply stated, in a footnote, that it had "previously ratified the view that Congress is authorized under the Enforcement Clause of the Thirteenth Amendment to legislate in regard to 'every race and individual.'"<sup>176</sup>

The Court in effect freed thirteenth amendment interpretation from any limitations based on an historical link with actual slavery as it existed in the United States. It can hardly be argued that, as a class, white persons ever labored under conditions of servitude or slavery. The logical implication of *McDonald* is that Congress may prohibit private discrimination without regard to the current or former inferior legal status of the class discriminated against. If this interpretation were accepted, congressional authority would become broad indeed. The standard Supreme Court pronouncement that Congress may define for itself what constitute the badges and incidents of slavery<sup>177</sup> would

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175. 106 U.S. 629, 641 (1882). See also the Court's rejection of the thirteenth amendment argument in *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 261 (1964).

176. 96 S. Ct. at 2582 n.18.

Lower federal court opinions which reached the same conclusion are not much more helpful in their discussion of constitutional authority. *Gannon v. Action*, 303 F. Supp. 1240 (E.D. Mo. 1969), modified, 450 F.2d 1227 (8th Cir. 1971), and *Central Presbyterian Church v. Black Liberation Front*, 303 F. Supp. 894 (E.D. Mo. 1969), are limited to a statutory interpretation of section 1981, and do not discuss constitutional authority under the thirteenth amendment. *Carter v. Gallagher*, 452 F.2d 315 (8th Cir. 1972) (*en banc*), involved discrimination by a public entity prohibited by the fourteenth amendment, which clearly applies to whites as well as blacks without regard to past legal status. The court in *Hollander v. Sears, Roebuck & Co.*, 392 F. Supp. 90, 92 n.4 (D. Conn. 1975), simply refers in a footnote to the colorblind nature of the thirteenth amendment. The brief, conclusory statement to like effect in *WRMA Broadcasting Co. v. Hawthorne*, 365 F. Supp. 577, 581 (M.D. Ala. 1973), is no more specific. Only the court in *Speiss v. C. Itoh & Co. (America)*, 408 F. Supp. 916 (S.D. Tex. 1976), completely discusses the shift in thirteenth amendment interpretation that has occurred since *Jones*.

177. See text accompanying note 158 *supra*.

amount to a judicial license to Congress to prohibit private discrimination against any individual, black or white, male or female.

This interpretation of *McDonald* can be avoided only by construing the thirteenth amendment to apply only to conditions or badges and incidents of slavery based on racial categories. If the amendment were to be so construed, however, the Court would have to disregard the amendment's race-neutral language.<sup>178</sup> It would also have to ignore the fact that Congress has enacted thirteenth amendment legislation outlawing peonage without regard to race and the Court has upheld the constitutionality of those statutes.<sup>179</sup>

To be sure, the Court has already disregarded past decisions which limited the scope of the amendment and confined con-

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178. Buchanan notes:

[T]he framers of the thirteenth amendment . . . adopted language of general application not confined to any particular species of the evil they sought to eliminate. This concern with general categories rather than specific examples permeates the Constitution. In a document intended "to endure through a long lapse of ages," a general clause should not be limited to the particular historical condition that originally inspired its inclusion in the document. The impelling historical condition can inform constitutional construction; it need not constrict it. If this canon of constitutional construction is applied to the badge of slavery concept, the conclusion becomes irresistible that Congress has power under the thirteenth amendment to protect non-racial classes.

Buchanan (pt. 8), *supra* note 41, at 1076-77.

179. *Clyatt v. United States*, 197 U.S. 207 (1905). See also *Bailey v. Alabama*, 219 U.S. 219, 240-41 (1911) ("While the immediate concern [of the Thirteenth Amendment] was with African slavery, the Amendment was not limited to that. It was a charter of universal civil freedom for all persons, of whatever race, color or estate, under the flag."); *Pollock v. Williams*, 322 U.S. 4 (1944).

In each of these cases the Supreme Court emphasized that peonage is based on a system of forced labor and did not depend on the race of the individual involved. In fact, in *Pollock* the Court stated that the evil of peonage "has never had general approval anywhere, and its sporadic appearances have been neither sectional nor racial." 322 U.S. at 11. See 18 U.S.C. § 1581 (1970); 42 U.S.C. § 1994 (1970).

That the thirteenth amendment is not tied to racial classes was recognized by the district court in *Guerra v. Manchester Terminal Corp.*, 350 F. Supp. 529 (S.D. Tex. 1972), *aff'd*, 498 F.2d 641 (5th Cir. 1974). The plaintiff was a Mexican national who alleged under section 1981 that he had been discriminated against by his employer because of his status as an alien. On the basis of the legislative history of section 1981, the district court held that aliens were protected under the statute, and thus necessarily accepted the assumption that a nonracial class could be protected by Congress's thirteenth amendment power. The Court of Appeals for the Fifth Circuit affirmed. For a discussion of the implications of these opinions, see Buchanan (pt. 7), *supra* note 41, at 881-83.

gressional power to proscribing slavery as an institution and to protecting only individuals whose past legal status was the equivalent of a slave's.<sup>180</sup> Since the *McDonald* Court disregarded these early decisions, and expanded thirteenth amendment power to protect white males from employment discrimination, a cynic might argue that the Court is equally prepared to disregard its previous decisions sanctioning race-neutral thirteenth amendment legislation and thereby exclude women from the amendment's protection because they are a nonracial class. That argument assumes, however, that the *McDonald* Court was simply illogical in its interpretation of the Constitution and section 1981. One would rather assume that the Court made a principled decision, applying the Constitution in light of changing circumstances and responding to a contemporary need to confront private discrimination against persons other than blacks, to free the scope of thirteenth amendment interpretation from its historical connection with persons whose ancestors were slaves. This concern for private discrimination against persons other than blacks logically demands extension of the thirteenth amendment's protection to women, for sex discrimination is at least as invidious as discrimination against white persons.

Once the original intent and historical framework of the thirteenth amendment have been thus disregarded, there is no justification for drawing a line between race and sex discrimination on the ground that the drafters of the thirteenth amendment were responding to the particular institution of slavery and its effects on a particular race.<sup>181</sup> In fact, to draw such a line would create an anomalous situation: women, whose past and current legal status corresponds to that of blacks with regard to political rights, social privileges, and economic opportunities, would be deprived of the protection of an amendment that has been construed to prohibit discrimination perpetuating an inferior legal status, while white men or racial groups whose past or current legal status is not comparable to that of blacks are given the amendment's full protection.

The Supreme Court may have been unaware of the logical implications of *McDonald*. If so, it may retreat from its position and perhaps leave women with thirteenth amendment protection only if they can convince courts that their legal status once

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180. See text accompanying notes 145-48 *supra*.

181. It should be noted that a brief allusion was made to the question of sex discrimination in the debates over the thirteenth amendment. See CONG. GLOBE, 38th Cong., 1st Sess. 1488 (1864); note 157 *supra*.

was comparable to that of black slaves.<sup>182</sup> If, however, the Court adheres to the position that the thirteenth amendment empowers Congress to enact legislation protecting white persons from private deprivations of fundamental rights without regard to their past or current legal status, women as a class must logically share in the amendment's protection.<sup>183</sup>

Of course, even if the logical reading of *McDonald* is adopted and Congress acknowledged to have power to proscribe private sex discrimination, congressional authority is still limited by the "badges and incidents" of slavery language. The Supreme Court has indicated its belief that the thirteenth amendment prohibits the deprivation of "fundamental rights which are the essence of civil freedom,"<sup>184</sup> such as the rights protected by 42 U.S.C. sections 1981 and 1982.<sup>185</sup> Notwithstanding the decisions in *Hodges v. United States*<sup>186</sup> and the *Civil Rights Cases*,<sup>187</sup> the Court has also held that employment and access to public accommodations may be protected by the thirteenth amendment.<sup>188</sup> Beyond that, it is impossible to predict how the Supreme Court would define

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182. See notes 172-73 *supra*.

183. Of course, should the Court adhere to *McDonald*, but refuse to acknowledge the logical extension of the thirteenth amendment's coverage to women, the Court may simply furnish another example of a judicial double standard, and women would need, as previously noted, the equivalent of the thirteenth amendment as well as the equal rights amendment in order to receive full protection.

184. *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 (1968).

185. *Id.*

186. 203 U.S. 1 (1906).

187. 109 U.S. 3 (1883).

188. *McDonald* explicitly recognized that the thirteenth amendment protects employment rights. See also *Johnson v. Railway Express Agency*, 421 U.S. 454 (1975). With respect to public accommodations, see the cautionary footnote in *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409, 441 n.78 (1968). For a general discussion of what might constitute badges and incidents of slavery, see Note, *supra* note 171, at 1307-12.

Buchanan, relying on legislative history and the language of the Constitution, argues that arbitrary class prejudice is equivalent to badges of slavery. Buchanan (pt. 8), *supra* note 41, at 1072-83.

For [the purpose of badge of slavery analysis] class prejudice can be defined as any form of arbitrary prejudice which, in its cumulative manifestations, has assumed a pattern of regional significance. [T]he language of the Constitution itself shows express concern for problems of race, color, religion and sex. The adoption of constitutional amendments expressly dealing with problems generated by these four categories of arbitrary prejudice is strong evidence that each category, in the context of American society, has assumed a pattern . . . of regional significance.

*Id.* at 1082. See also Note, *Federal Power to Regulate Private Discrimination: The Revival of the Enforcement Clauses of the Reconstruction Era Amendments*, 74 COLUM. L. REV. 449 (1974).



badges and incidents of slavery. In any event, the restrictions which the Court places on its own enforcement of the thirteenth amendment do not necessarily apply to Congress:

The denial of the right of Negroes to swim in pools with white people is said to be a "badge or incident" of slavery. Consequently, the argument seems to run, this Court should declare that the city's closing of the pools to keep the two races from swimming together violates the Thirteenth Amendment. To reach that result from the Thirteenth Amendment would severely stretch its short simple words and do violence to its history. Establishing this Court's authority under the Thirteenth Amendment to declare new laws to govern the thousands of towns and cities of the country would grant it a law-making power far beyond the imagination of the amendment's authors. Finally, although the Thirteenth Amendment is a skimpy collection of words to allow this Court to legislate new laws to control the operation of swimming pools throughout the length and breadth of this Nation, the Amendment does contain other words that we held in *Jones v. Alfred H. Mayer Co.* could empower Congress to outlaw "badges of slavery." The last sentence of the Amendment reads:

"Congress shall have power to enforce this article by appropriate legislation."

But Congress has passed no law under this power to regulate a city's opening or closing of swimming pools or other recreational facilities.<sup>189</sup>

Thus, the Court may defer to Congress's decision to promulgate thirteenth amendment legislation to prohibit private discrimination where it would not of its own accord declare such private action unconstitutional.<sup>190</sup>

The Supreme Court's recent thirteenth amendment decisions could provide important support to existing federal legislation against private sex discrimination. For example, they should resolve any doubts concerning the extension of the Fair Housing Act,<sup>191</sup> consistently read as a piece of thirteenth amendment legislation,<sup>192</sup> to cover sex discrimination. With respect to federal legislation enacted in the nineteenth century, however, their impact is uncertain. The language of 42 U.S.C. sections 1981 and 1982 may continue to be read, as a matter of congressional intent, to provide protection only against private race discrimination.<sup>193</sup>

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189. 403 U.S. 217, 226-27 (1971).

190. See note 188 *supra* for articles discussing possible limitations on congressional power inhering in the badge of slavery concept. Any regulation of private conduct would also necessarily be limited by the need to protect other constitutional rights, such as the rights to free association and privacy. See *Runyon v. McCrary*, 96 S. Ct. 2586, 2596 (1976).

191. 42 U.S.C. §§ 3601-3631 (Supp. V 1975).

192. See note 51 *supra*.

193. See the discussion of the language of 42 U.S.C. § 1981 in McDon-

The other significant statute, 42 U.S.C. section 1985(3), contains no reference to race, but, because of the generality of its language, its impact depends on judicial interpretation.<sup>194</sup> As noted earlier, federal courts have often failed to treat sex discrimination claims with the same concern given race discrimination, and the Supreme Court is reluctant to take action under the thirteenth amendment without explicit congressional guidance. Thus, federal courts may refuse to provide women a remedy against private sex discrimination under the general language of section 1985(3), despite the thirteenth amendment.<sup>195</sup>

An exhaustive discussion of questions of statutory construction, however, will not be pursued here. The point is simply that Congress has ample constitutional authority by virtue of the

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ald v. Santa Fe Trail Transp. Co., 96 S. Ct. 2574 (1976), and the cases cited in note 38 *supra*.

Although the Court found that section 1981 "was intended to protect whites as well as nonwhites," 96 S. Ct. at 2584, one of its sources for this piece of legislative history was a statement by Representative Shallabarger which suggests that women were not to be included within the protection of what became section 1981: "Your State may deprive women of the right to sue or contract or testify, and children from doing the same. But if you do so, or do not so as to one race, you shall treat the other likewise. . . ." *Id.* at n.23. This statement represents the opinion of one legislator, and need not control the interpretation of "legislative history." During this period of American history women were not considered "persons" deserving protection under the laws, see *In re Lockwood*, 154 U.S. 116 (1894), but when the nineteenth amendment granted women the right to vote, any such argument to support discriminatory treatment was foreclosed. Modern construction of the statute need not be tied to discredited assumptions about the legal position of women.

194. The language of section 1985(3) is general. See note 13 *supra*. Thus, a court will have to determine whether the factual situation on which a section 1985(3) cause of action is based involves the imposition of a badge or an incident of slavery. If the court holds that none is involved, it cannot constitutionally apply the statute. See *Griffin v. Breckenridge*, 403 U.S. 88, 105 (1971), in which the Supreme Court allowed a suit alleging racial discrimination to be brought pursuant to 42 U.S.C. § 1985(3) after finding that "discriminatory private action [was] aimed at depriving [blacks] of the basic rights that the law secures to all free men." See also note 101 *supra*.

195. See *Vorchheimer v. School Dist. of Philadelphia*, 532 F.2d 880 (3d Cir. 1976), *cert. granted*, 97 S. Ct. 252 (1976) (No. 76-37), for an example of what courts may do with sex discrimination claims under federal legislation which is somewhat ambiguous. The court there came perilously close to adoption of a "separate but equal" analysis in applying 20 U.S.C. §§ 1701-1721, a statute ostensibly passed by Congress to eliminate sex discrimination in education. It concluded, over a strong dissent, that the statute was not applicable to a situation in which a teenager had been refused admission to public high school solely because of her sex.

thirteenth amendment to reach innumerable types of sex discrimination. Courts can refuse to apply existing federal legislation to private sex discrimination if the legislation is limited as a matter of congressional intent, but should not impose restrictions based on an interpretation of constitutional *authority*.

### III. CONCLUSION

The question of the scope of congressional authority over private sex discrimination is an important one. Current debate over women's rights which has concentrated on the ratification of the equal rights amendment ignores the fact that the amendment will neither add to congressional authority to remedy the significant disparities in treatment of private race and sex discrimination in existing federal legislation nor affect judicial interpretations of nineteenth century civil rights laws. If the legislative power given Congress by the enforcement clauses of the fourteenth and, in particular, the thirteenth amendments is properly evaluated, however, disparities resulting from congressional inaction and narrow judicial interpretations can be eliminated. Congress will be put on notice that there are constitutional sources of authority for a more far-reaching federal prohibition of private sex discrimination, and federal courts, asked to apply existing federal legislation, such as 42 U.S.C. section 1985 (3), to proscribe private sex discrimination, should find no constitutional bar to that course of action.